

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
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3 GAMCO INVESTORS, INC., et al.,

4 Plaintiffs,

5 v.

03 Civ. 5911 (SAS)

09 Civ. 7962 (SAS)

6 VIVENDI, S.A. and  
7 VIVENDI UNIVERSAL, S.A.,

8 Defendants.  
-----x

Conference

9  
10 New York, N.Y.  
February 19, 2013  
2:07 p.m.

11 Before:

12 HON. SHIRA A. SCHEINDLIN

13 District Judge  
14

15 APPEARANCES

16  
17 ENTWISTLE & CAPPUCCI  
18 Attorneys for Plaintiffs  
19 BY: VINCENT R. CAPPUCCI  
EVAN T. RACITI  
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21  
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Attorneys for Defendants  
23 BY: PAUL C. SAUNDERS  
TIMOTHY CAMERON  
24 MARGOT A. MILLER  
XIAO LIU  
25

1 (In open court)

2 (Case called)

3 THE COURT: Your next witness? Next witness?

4 MR. SAUNDERS: Good afternoon, your Honor. May I  
5 proceed?

6 THE COURT: Please.

7 MR. SAUNDERS: We call as our next and last witness,  
8 Mario J. Gabelli.

9 MARIO J GABELLI,

10 called as a witness by the Defendant,

11 having been duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. SAUNDERS:

14 Q. Mr. Gabelli, good afternoon.

15 Would you please give the Court a very brief summary  
16 of your educational and employment history.

17 A. Sure. I grew up in the Bronx. Went to PS4. Went to  
18 St. Joseph's in the South Bronx. Went to Immaculate Conception  
19 in the South Bronx. Went to Evander Childs High School. Went  
20 to Fordham Prep. Went to Fordham University. Went to Columbia  
21 University graduate school of business, and briefly enrolled in  
22 a PhD program at NYU.

23 THE COURT: You said briefly enrolled. Did you  
24 complete that?

25 THE WITNESS: No. It's too much work.

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Gabelli - direct

1 Q. And your employment history, briefly?

2 A. I started as an analyst on the day I graduated -- on the  
3 Monday after; I graduated on a Saturday -- at a firm called  
4 Loeb Rhoades & Company. Went to a firm called William D.  
5 Witter -- we merged into Drexel Burnham, and then I started an  
6 institutional research firm called Gabelli & Company on  
7 January 1, 1977.

8 Q. And have you been employed in one capacity or another with  
9 Gabelli or various Gabelli enterprises ever since that time?

10 A. That's 45 years, thank you. Yes.

11 Q. And what is your current position with -- I guess I could  
12 use Gabelli as a generic term, and you'll explain to us in more  
13 detail by whom you are actually employed. But what is your  
14 current position?

15 A. We went public in 1999, February of 1999 through Merrill  
16 Smith Barney. So I am the CEO of a publicly trading company.  
17 I'm also serving as the chairman, and I function more  
18 effectively daily as the chief investment officer on the value  
19 side of the -- of the house.

20 Q. All right, sir. And so would it be fair to say that GAMCO  
21 Investors is a part of this enterprise, GAMCO Investors, Inc.?

22 A. Well, a road map could help. The public company is called  
23 Gabelli -- Gabelli Asset Management, shortened to GAMCO  
24 Investors. Below that is an institutional asset management  
25 firm. That is private wealth and institutional. Then there's

D2jegam1

Gabelli - direct

1 Gabelli funds which is a mutual fund. That is the hedge funds.  
2 And then there's a broker dealer and institutional research  
3 firm.

4 Q. All right. What was your major at Fordham?

5 A. Undergraduate I assume, not the high school?

6 Q. Yes.

7 A. I was an accounting major and a philosophy minor.

8 Q. All right, sir. Now, I want to ask you some questions  
9 about something that we heard yesterday, and I'm going to ask  
10 you to elaborate for a moment, if you would, about two men  
11 called Graham and Dodd. If you would explain to us briefly who  
12 they are, how they influenced you and what role that influence  
13 plays in the investment philosophy of Gabelli. By that --

14 THE COURT: That was three questions.

15 MR. SAUNDERS: Three questions.

16 THE COURT: Do you remember all three or do you want  
17 to do one at a time?

18 THE WITNESS: Thank you, your Honor.

19 THE COURT: I think the first of three is who are  
20 they?

21 THE WITNESS: Basically I'm going to take a little  
22 liberty with your question, because they didn't influence me.  
23 But notwithstanding that --

24 THE COURT: Let's go with the first one. Who are  
25 they?

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Gabelli - direct

1 THE WITNESS: Graham and Dodd were two professors at  
2 the Columbia graduate school of business. And they wrote a  
3 book called Graham and Dodd Value Investing in 1934.

4 THE COURT: Okay. And did their book or theories  
5 influence you?

6 THE WITNESS: What happened was that I was always  
7 interested in the stock market from the days I used to caddy up  
8 in Scarsdale, New York, hitchhiking up from the Bronx. And I  
9 didn't know what part of Wall Street I wanted to go into until  
10 I took a course from Roger Murray, a course with Roger Murray,  
11 who was the most influential person in understanding what I  
12 would do in terms of my career. He had written a subsequent  
13 book --

14 THE COURT: Where was he?

15 THE WITNESS: He was teaching finance at Columbia  
16 Business School.

17 THE COURT: And you went there?

18 THE WITNESS: Yeah. This was the security analysis  
19 program.

20 Third question?

21 BY MR. SAUNDERS:

22 Q. Third question was what role, if any, did that influence  
23 play on the investment philosophy of the Gabelli companies?

24 A. Well, you know, everyone is -- has a variety of elements  
25 that go into their philosophy. But to fast-forward from the

D2jegam1

Gabelli - direct

1 time I started as an analyst in the mid-'60s to when I started  
2 the firm, in the mid-'70s, no one wanted to do anything on Wall  
3 Street. They didn't -- it was not a good business to go in.  
4 You could buy a taxicab driver medallion for \$30,000. You  
5 could buy an apartment on Park Avenue, believe it or not, for  
6 \$30,000, or a seat on New York.

7 So when we started the firm, nobody wanted stocks. So  
8 we came up with the notion of, what is a stock worth? And  
9 those are the elements that the background, both accounting  
10 philosophy, Graham and Dodd, security analysis all converges to  
11 say, hey, this is not a complicated world. What would someone  
12 who has money, what would they pay to buy a company that's  
13 listed on the New York Stock Exchange or on the American Stock  
14 Exchange, which existed at the time, or the over-the-counter,  
15 which existed at the time.

16 Q. Is that what one would call value investing?

17 A. No. That was the -- what I just described -- but you're  
18 close. That was what I described as the private market value  
19 approach to investing. And that is, that you -- an analyst by  
20 his -- the essence of what one does in research gathers data  
21 from publicly available sources, a ten -- they probably didn't  
22 have 10Ks then, but whatever the documents were that were  
23 publicly available and a report of trade conferences, visiting  
24 competitors, visit the companies, you gather that data. And  
25 I'm sure you heard this before. You kind of model it out. At

D2jegam1

Gabelli - direct

1 that time we used 13-column spreadsheets and you manually wrote  
2 them in. Today you use -- what are those devices in front of  
3 you, PCs? And basically you then project the data. The  
4 interpretation of the data is what we brought to the table, and  
5 that was basically a need to pay bills. And that is, who would  
6 want to buy this stock and why? And that was only 40-odd years  
7 ago, and those were some fundamental questions in the world  
8 that we live in.

9 Q. Going back to Graham and Dodd for a moment. Would it be  
10 fair to say that in your literature at Gabelli companies you  
11 have used Graham and Dodd as an example of the kind of  
12 investment philosophy that you use or endorse?

13 A. Well, we don't endorse it. They don't need our  
14 endorsement. But within the framework of a benchmark, Graham  
15 and Dodd is a shorthand because the next element would be  
16 Warren Buffett. So it would be Graham, Dodd, plus Buffett,  
17 plus Gabelli equals what we do. And we kind of put that on  
18 T-shirts and make it available. We should send some -- we  
19 don't have any available. Don't look around. I didn't bring  
20 any.

21 MR. SAUNDERS: Your Honor, I have a book of exhibits  
22 that I'm going to ask Mr. Gabelli about. I put a book for him  
23 on the witness table, and with your permission, I'll hand a  
24 copy up for you and for your clerk.

25 THE COURT: Thank you.

D2jegam1

Gabelli - direct

1 Q. Now, Mr. Gabelli, if you would look, please, at Exhibit BD  
2 in that book.

3 A. I'm sorry. I have a D to start with.

4 Q. Yeah. Exhibit BD.

5 THE COURT: Toward the back.

6 Q. They're in alphabetical order.

7 THE COURT: BD in the back.

8 THE WITNESS: Thank you. BD, broker dealer.

9 THE COURT: Right.

10 MR. SAUNDERS: Your Honor, this is already in  
11 evidence.

12 BY MR. SAUNDERS:

13 Q. If we look at the third page of that exhibit, page 2487.  
14 Do you have that?

15 A. Yes. Thank you.

16 Q. There's a schematic chart that starts with Graham and Dodd  
17 at the bottom, goes up to Buffett and ends with Gabelli at the  
18 top. Could you explain to us very briefly what that is meant  
19 to represent.

20 A. Yeah. This is basically a marketing piece to try to  
21 conceptualize, in a very one-page document, what essentially  
22 the evolution of value investing was. And that is that you go  
23 from the Graham and Dodd of 1934 to the Warren Buffett of 1950,  
24 when he attended the Columbia graduate school of business and  
25 attended class with Ben Graham to the next version of that.



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1 And each one was bringing in their elements of the mosaic.

2 And we added to that mosaic according to the academics  
3 the notion of, what is a business worth when it would be taken  
4 over by someone that no longer trades on the New York or listed  
5 exchange called the private market value?

6 And then below that is the word catalyst, which is  
7 another element that we added to the equation.

8 Q. And what exactly is a catalyst in your Lexicon?

9 A. Well, some organizations, like colleges and universities,  
10 that professor has tenure. That means that he has a job for a  
11 period of time. And within our business we don't have any  
12 tenure with regards to the visibility of our cash flow; so that  
13 when we buy a stock, we were looking for some kind of an event  
14 that would allow our clients to earn a return. And we labeled  
15 that a catalyst. And that is a visible event. That's public  
16 information that is part of the opportunity to surface that  
17 value.

18 Q. Now, you said earlier that your private market value was  
19 based upon what somebody would pay for the assets of this  
20 company. I think that's basically what you said?

21 A. Yeah, if I did, I should have flushed it out a little  
22 further. And that is what would a private equity, known as an  
23 LBO, leveraged buyout firm, pay, because a corporation called a  
24 strategic buyer would pay more.

25 Q. All right. So is the catalyst limited to those types of

D2jegam1

Gabelli - direct

1 buyers as an event?

2 A. Well, you know, over 45 years things have changed. So at  
3 the time leveraged buyouts weren't easy to understand and easy  
4 to explain. They were kind of a new name for what was called  
5 bootstrap financing, which is the dynamics that the Charlie  
6 Allens of the world and others grew up with in the '50s and  
7 '60s. So that in itself -- that is, a company going private --  
8 would be an example of that. But there are many others.

9 Q. For example, would change of -- could change of management  
10 be a catalyst?

11 A. You bet, a lot. You did. Yes.

12 Q. Yeah, okay.

13 A. Whether it's a government, like if Fidel Castro was to  
14 leave, that would be a catalyst.

15 Q. And could a new regulation, new government regulation be a  
16 catalyst?

17 A. Maybe. Could be a negative catalyst.

18 Q. All right. If you look at page 02489 in this document,  
19 there's another schematic drawing that we have talked about  
20 yesterday. And I'd ask you if you could explain that schematic  
21 drawing to the Court. What is it meant to represent?

22 A. I must admit that I've seen this in the past, and someone  
23 else who put these marketing books together, I -- I hope they  
24 can explain it, they did, hopefully better than I could here  
25 today. But essentially it just means it's part of a simple

D2jegam1

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1 concept. If we have an individual who does research, and his  
2 capacity is 50 stocks, and he covers the universe of 50 stocks,  
3 he analyzes the company, watches it, monitors it -- and I can't  
4 read the -- mine is all whited out. And there's a catalyst of  
5 some sort. And then how does it go into a portfolio, as  
6 opposed to just picking stocks? If someone entrusts you an  
7 asset, you just don't buy one stock; you buy a portfolio.  
8 That's the way I would interpret this.

9 Q. So let me try it this way: In your investment methodology,  
10 if the private market value as computed by your analysts would  
11 be lower than the public market price of a particular security,  
12 in general, would you buy that security?

13 A. It's possible.

14 Q. Under what circumstances would you buy it if the private  
15 market value were lower than the public market price?

16 A. Well, first of all, the analyst may have done it wrong.

17 Q. I'm assuming the analyst did it correctly.

18 A. Well, I don't. I mean, I gave you an example. You asked  
19 me when I would buy it if the analyst -- you know --

20 THE COURT: You have to answer his question.

21 THE WITNESS: Thank you.

22 THE COURT: Excuse me. I'm in charge here. So you  
23 have to answer his question.

24 His question was: Assuming the analyst got it  
25 right -- he says the private market value is less than the

D2jegam1

Gabelli - direct

1 public market price -- would that be a buy in your view of  
2 things?

3 THE WITNESS: It could be. For example, let's assume  
4 Heinz was selling today because Warren Buffett and an entity  
5 called 3G bought the company above or at private market value.  
6 We would buy that stock because we thought that maybe somebody  
7 else would come in and top that.

8 BY MR. SAUNDERS:

9 Q. I see.

10 A. There are other examples, but I don't think that too often,  
11 but I always think about each stock specifically.

12 Q. Would it be fair to say that, in general, your investment  
13 methodology is that you buy stocks when their private market  
14 exceeds their public market price in general?

15 A. Yeah, I would say that's a fair statement.

16 Q. All right. Now, have you ever described in any of your  
17 marketing or other literature the private market value as the  
18 intrinsic value of a security?

19 A. I don't think I would do that. Now, others may have taken  
20 liberty with that because intrinsic value is not private market  
21 value.

22 Q. It's not?

23 A. No.

24 Q. Are you sure about that?

25 A. Since I came up with the word private market value and the

D2jegam1

Gabelli - direct

1 academics attribute that to me, eh, yeah. Yes.

2 Q. All right. Would you look at AZ in your book.

3 MR. SAUNDERS: Your Honor, this is already in  
4 evidence.

5 Q. Do you have that?

6 A. Yes.

7 Q. Do you see on the second page of that exhibit there's a  
8 letter -- I guess it's the fourth page of the exhibit --  
9 there's a letter with your name and Marc Gabelli, who I assume  
10 is your son's name also?

11 A. I see the letter.

12 Q. Did you write that letter?

13 A. No.

14 Q. Did somebody write it and put your name on it?

15 A. I didn't write it.

16 Q. Did somebody else write it and put your name on it?

17 THE COURT: Wait a minute, folks. Clearly somebody  
18 else wrote it because there's a letter, right?

19 THE WITNESS: Yes.

20 THE COURT: And you didn't write it?

21 THE WITNESS: Yes.

22 THE COURT: That means somebody else wrote it by  
23 definition.

24 BY MR. SAUNDERS:

25 Q. My next question is: Did the person who wrote it put your

D2jegam1

Gabelli - direct

1 name on it with your permission?

2 A. I don't think so.

3 THE COURT: They did not have your permission to put  
4 your name on this letter?

5 THE WITNESS: I --

6 THE COURT: Dear Investors, sincerely, Mario Gabelli,  
7 Marc Gabelli?

8 THE WITNESS: I think, your Honor, to explain it,  
9 there are many times in which I travel a great deal and  
10 documents are written. I don't sign it. They could type it on  
11 and it happens. I don't read all of the documents. We have  
12 200 individuals and many documents.

13 BY MR. SAUNDERS:

14 Q. All right. If you look at page 005 of this document.  
15 Under the heading Gabelli Asset Management overview, I would  
16 direct your attention to the last sentence of the first  
17 paragraph, beginning with the words "we are."

18 THE COURT: I have not found it.

19 I see it now, we are research driven.

20 Q. We are research driven fundamental investors focusing on,  
21 quote, value with a catalyst, closed quote, investing based on  
22 the principles of Graham and Dodd and further adapted by our  
23 chief investment officer, Mario Gabelli, with his development  
24 of private market value analysis.

25 Do you see that, sir?

D2jegam1

Gabelli - direct

1 A. Yes.

2 Q. Is that a correct description of your investment  
3 methodology?

4 A. Well, it's certainly something that someone would attribute  
5 to me.

6 THE COURT: That wasn't his question. Is it correct?  
7 Is it a correct statement of your investment philosophy?

8 THE WITNESS: It's not completely encompassing.

9 THE COURT: It's not completely encompassing? Does  
10 that make it incorrect?

11 THE WITNESS: No, it is not, your Honor.

12 THE COURT: So it's correct?

13 THE WITNESS: If those are the two choices, the answer  
14 is correct.

15 BY MR. SAUNDERS:

16 Q. In what respect is it not complete?

17 A. Our philosophy from day one, when we started the firm, was  
18 also to be tax efficient, so that you would also -- the  
19 objective of investing is to generate a positive absolute  
20 greater return, risk adjusted, client specific and tax  
21 sensitive. So I would have embellished on that, if I were  
22 describing it myself.

23 Q. All right. If you look at page 007 -- yeah, page 007 of  
24 this exhibit.

25 A. Okay.

D2jegam1

Gabelli - direct

1 Q. In the third full paragraph, under the heading Gabelli  
2 Asset Management portfolio overview, in the third paragraph I  
3 would direct your attention to the second -- a third -- I'm  
4 sorry, the second -- the third full sentence, beginning with  
5 the words "the objective is."

6 MR. CAPPUCCI: Your Honor, I have an objection. I  
7 mean, I just think it would be fair to the witness to allow the  
8 witness to flip through the document as a whole to refresh  
9 recollection. Mr. Saunders --

10 THE COURT: He hasn't said that he needs his  
11 recollection refreshed. Excuse me. Now, look, Mr. Cappucci,  
12 let me rule on your objection.

13 He hasn't said he needs his recollection refreshed.  
14 Mr. Saunders wants to ask him about a particular sentence. If  
15 he says, I need a moment, I'd like to read this whole page, of  
16 course I'll say sure. Maybe he has no problem with the  
17 sentence that Mr. Saunders wants him to focus on, which reads:  
18 The objective is to identify large differences between our  
19 estimate of PMV and the stock market price.

20 What was your question about that sentence,  
21 Mr. Saunders?

22 MR. SAUNDERS: First of all, I want to make sure the  
23 witness has found it.

24 BY MR. SAUNDERS:

25 Q. Have you found that sentence?



D2jegam1

Gabelli - direct

1 A. Thank you for highlighting it in yellow. Yes.

2 Q. Is that a correct description of your investment objective?

3 A. Standing alone, there is no God. This sentence on its own  
4 cannot -- you know, has to be taken in the context of a larger  
5 dynamic. That sentence is cherry-picking a statement.

6 THE COURT: Be that as it may, I'd like to know if  
7 that's a goal, to find one stock, I guess, where there's a  
8 large difference between your estimate of PMV and stock market  
9 price. Is that your goal?

10 THE WITNESS: Yes, that is an element of the goal.  
11 And then because we are not -- have tenure, we try to have that  
12 catalyst which is joined at the hip with that. So this is an  
13 important building block of that goal.

14 THE COURT: I understand that. That's good.

15 BY MR. SAUNDERS:

16 Q. It's one element of your investment methodology, would that  
17 be correct?

18 A. It's part of the mosaic.

19 Q. All right. And you told us a moment ago that you did not  
20 regard the private market value as representing the intrinsic  
21 value of the security. Do you recall that?

22 A. I thought I said -- maybe I didn't, and it's -- the way I  
23 look at private market value is, what does the  
24 fundamentalist -- what will an individual who's in the  
25 leveraged buyout business pay to buy an entire piece of a

D2jegam1

Gabelli - direct

1 public company -- an entire public company? And I call that  
2 private market value.

3 Q. And I think I asked you before if you would call it the  
4 intrinsic value, and you said no. Did I misunderstand that?

5 A. I personally call it private market value. If others  
6 attribute the word intrinsic, it is the private market -- you  
7 didn't ask what is the private market value, but I would say  
8 that that's what I view as private market value.

9 Q. All right. If you look at page 009 of Exhibit AZ. Do you  
10 have that?

11 A. You're going -- okay.

12 Q. And if you wish to look at any other part of this document,  
13 please feel free to do so.

14 A. I can't read them. The print is too small.

15 Q. It should be on your screen.

16 A. Not the other document -- not the other pages of the  
17 document, but what's on the screen is --

18 Q. Page 009, first full paragraph. Do you see the first part  
19 of that paragraph talks about Graham and Dodd? Are you with  
20 me?

21 A. You highlighted the words Benjamin Graham and Graham and  
22 Dodd.

23 Q. Now I want to highlight the sentence that begins with the  
24 words "our goal is to identify."

25 A. Yeah.

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Gabelli - direct

1 Q. No what?

2 THE COURT: Why don't we read the whole sentence?  
3 Excuse me, I'm reading it: Our goal is to identify companies  
4 in the public market that are selling at differences to their  
5 intrinsic or private market values, with a catalyst in place to  
6 generate returns.

7 Do you see the sentence?

8 THE WITNESS: Yes. Thank you, your Honor.

9 THE COURT: All right. And the question is?

10 BY MR. SAUNDERS:

11 Q. Now, is that sentence an accurate description of your goal?

12 A. No. I would not describe it that way if I were describing  
13 this. I would describe it as the private market value. I do  
14 not use intrinsic value at the same time as private. They're  
15 different concepts.

16 THE COURT: Clearly somebody in your company did,  
17 right?

18 THE WITNESS: Clearly I should have read this earlier.

19 THE COURT: Yeah.

20 Q. I take it you didn't read this before it went out?

21 A. I thought I stipulated that earlier. I said it before,  
22 that I don't read everything that everyone writes. I clearly  
23 need to educate.

24 Q. All right. Under the heading research methodology in that  
25 same page, the last full paragraph?

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Gabelli - direct

1 THE COURT: The one that reads the objective of this  
2 process?

3 MR. SAUNDERS: Yes, your Honor.

4 THE COURT: Is to identify companies that trade at  
5 significant differences to their intrinsic or private market  
6 values.

7 You see the sentence, right?

8 THE WITNESS: Yes, I do, your Honor.

9 BY MR. SAUNDERS:

10 Q. And your testimony is that that's not correct either?

11 A. You're using the word correct or incorrect as though you're  
12 giving a quiz. The answer is that I, as a practitioner, have  
13 used the concept of private market value and introduced it into  
14 the Graham and Dodd/Murray Lexicon of security analysis in the  
15 late '60 -- '70s. Private market value is not the same as  
16 intrinsic value in my mind. It's never been the same. But  
17 there is an element that can be traced back to intrinsic value  
18 in the Graham and Dodd literature.

19 Q. All right. If you look at page 010 in this exhibit.

20 THE COURT: I'm sorry, 010? What does that mean? Ah.

21 MR. SAUNDERS: At the very bottom.

22 THE COURT: Got it. Next page, 010.

23 Q. Under the heading catalyst -- and I will call your  
24 attention to the second sentence in that paragraph.

25 THE COURT: The next step is to determine events that

D2jegam1

Gabelli - direct

1 will narrow the spread between a stock's public market price  
2 and our determination of its intrinsic value.

3 Do you see the sentence, right?

4 THE WITNESS: Yes, I do, your Honor.

5 Q. Is that a reference to the private market value?

6 A. It's not a reference. It's a totally different  
7 description. Can I help out?

8 THE COURT: I don't think so. I think you have to  
9 answer the questions the lawyer asks.

10 Q. Let me put my question precisely. Is the word intrinsic  
11 value, as used in that sentence, a reference to the private  
12 market value?

13 A. It is not the way I would describe private market value,  
14 nor is it how I look at what a company is when I look at  
15 private market value.

16 Q. My question was a little bit different, Mr. Gabelli. I'm  
17 simply asking you whether the reference in that paragraph --  
18 and I accept that you don't accept those words, but I'm asking  
19 you whether the reference to intrinsic value in that sentence  
20 is a reference to private market value.

21 A. No.

22 Q. Well, then what is it?

23 A. I have no idea. It's what -- let me -- can I help you?

24 THE COURT: No. What spread is being referred to  
25 there, a spread between a stock's public market price and what?

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Gabelli - direct

1 And our determination of what?

2 THE WITNESS: There are --

3 THE COURT: Can you try to answer my question?

4 THE WITNESS: Yes, your Honor. Can I --

5 THE COURT: No, you can't.

6 This sentence refers to a spread. The next step is to  
7 determine events that will narrow the spread between a stock's  
8 public market price and our determination of what?

9 THE WITNESS: Private market value.

10 THE COURT: Thank you. Thank you. That was his  
11 question.

12 THE WITNESS: Thank you, your Honor.

13 MR. SAUNDERS: Thank you.

14 THE COURT: You're welcome, Mr. Saunders.

15 THE WITNESS: I'll do a Rubio moment.

16 THE COURT: Was bad enough the first time,  
17 Mr. Saunders.

18 BY MR. SAUNDERS:

19 Q. Page 014 in this exhibit. In particular under the heading  
20 strategy description, the third full sentence?

21 THE COURT: In this context?

22 MR. SAUNDERS: I'm sorry. In this context, yes, your  
23 Honor.

24 THE COURT: In this context we carefully select stocks  
25 whose intrinsic value, based on our estimate of current asset

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Gabelli - direct

1 value and future growth and earnings power, is significantly  
2 different from the value as implied by the public market.

3 First of all, do you see the sentence?

4 A. Yes.

5 THE COURT: All right. Your question, Mr. Saunders?

6 Q. Is the word intrinsic value there meant to be a reference  
7 to private market value?

8 THE COURT: As used in that sentence?

9 MR. SAUNDERS: As used in that sentence.

10 A. I can see the person that wrote that writing it in that  
11 fashion.

12 THE COURT: Did mean it to refer to private market  
13 value?

14 THE WITNESS: Yeah, but I would not write it that way.

15 THE COURT: I understand that.

16 A. I can see how a person that is not trained in financial  
17 analysis can interpret it that way.

18 Q. Do you have any idea why this was written this way and  
19 presumably disseminated in this fashion?

20 A. Well, this article that you took this from was for the  
21 hedge funds, and they are written for a different audience than  
22 I would write it for.

23 But I think it goes back to in about 1993, 1994, when  
24 I asked Roger Murray, the professor that I had at Columbia, to  
25 lecture at the Museum of Television and Radio. And he pointed

D2jegam1

Gabelli - direct

1 out what intrinsic value was and how it differed from private  
2 market value that I came up with.

3 THE COURT: We obviously can't have Professor Murray's  
4 out-of-court statement, so we go on, Mr. Saunders.

5 MR. SAUNDERS: I'm not going to object to that, your  
6 Honor. I'm -- it is what it is.

7 THE COURT: He didn't give us the statement, and I  
8 don't want it.

9 MR. SAUNDERS: I understand.

10 THE COURT: It's an out-of-court statement.

11 BY MR. SAUNDERS:

12 Q. Now, attached to this document as an appendix are some  
13 newspaper articles. Do you see that, sir?

14 A. Which one of the newspaper articles?

15 THE COURT: He's just saying there's a group of them.  
16 The first one is from the Financial Times, the second from the  
17 Wall Street Journal Europe. You see those.

18 THE WITNESS: The third one or last one is not a  
19 financial article. It's from the Columbia University graduate  
20 school of business. Somebody wrote it up, so it's not a  
21 newspaper article.

22 THE COURT: Okay. So but for the last one, the others  
23 are newspaper articles, right?

24 MR. SAUNDERS: Right.

25 Q. Have you ever seen these before?



D2jegam1

Gabelli - direct

1 A. The last one I -- the Graham and Dodd breakfast I have seen  
2 before, yes. The others I may have. I don't remember them,  
3 other than some material that was passed by me. I just looked  
4 at them as a headline.

5 Q. Do you know why they were attached as appendices to this  
6 particular hand-out?

7 A. I don't want to speculate.

8 Q. All right. I just want to ask you a question about two  
9 comments, two pieces of these articles. The first is the  
10 article in the Financial Times. And this is an article that  
11 quotes your son, Marc Gabelli, an interview with your son.

12 Do you see that?

13 A. I see the article, an alternative path to growth.

14 Q. The passage that I want to ask you about is in the  
15 right-hand column, the second full paragraph, beginning with  
16 the words, no quotes, we try to find companies.

17 THE COURT: The whole sentence is, we try to find  
18 companies trading at large differences to their private market  
19 value in the public market.

20 You see the sentence, right?

21 THE WITNESS: Yes, I do, your Honor.

22 Q. Would that be accurate in your view?

23 A. Which part?

24 THE COURT: That sentence.

25 A. In other words, I don't know -- it says private market

D2jegam1

Gabelli - direct

1 value, 2003, of about \$95 to \$100 a share. I can't remember  
2 that.

3 THE COURT: Where are you? He's just talking about  
4 the very first sentence: We try to find companies trading at  
5 large differences to their private market value in the public  
6 market. That's all.

7 THE WITNESS: Because mine -- it wasn't highlighted in  
8 yellow until now.

9 THE COURT: No, no, just that.  
10 A. That first sentence is fine. I have no problem with that.  
11 Q. All right. So now the next sentence reads, in Vivendi's  
12 case, for example, the analysts showed --

13 THE COURT: The analysis.  
14 Q. I'm sorry. The analysis showed the company was trading at  
15 a 50 percent discount to a private market value in 2003 of  
16 about \$95 to \$100 a share. It's cheap on a cash flow multiple  
17 basis and private value basis.

18 Do you see that, sir?  
19 A. Yeah. In this particular case --

20 THE COURT: I don't think there is a question yet.  
21 All he asked so far is, do you see it?

22 A. Yes.  
23 Q. Is that accurate in your view?

24 A. To the degree that it talks about private value as opposed  
25 to intrinsic value, I agree.

D2jegam1

Gabelli - direct

1           Secondly, to the degree that I don't know the numbers  
2 of 95 to \$100, I have no idea whether that's accurate or not.  
3 It was too long ago.

4 Q. Do you recall that in the 2001/2002 time period Vivendi's  
5 private market value was higher than the public market price?

6 A. I remember buying some shares and preparing for today. And  
7 so I before indicated that generally I would have assumed that  
8 the private market value was higher than the public price.

9 Q. Do you assume that the public market price of a security is  
10 an accurate measure of its intrinsic value?

11 A. We've been discussing this for a while with regards to  
12 private market value, including this page you just showed me --

13           THE COURT: Now he's asking you a different question  
14 about the public market value. Did you hear the question?

15           THE WITNESS: I would like to -- thank you, your  
16 Honor, I did not. I was thinking of this question.

17           THE COURT: No. So his question was: Do you assume  
18 that the public market price of a security is an accurate  
19 measure of its intrinsic value?

20           THE WITNESS: I -- they're apples and oranges. In a  
21 given day I'm assuming a stock reflects all the information  
22 that's out there, but I -- I don't look at intrinsic value by  
23 the thought I've been saying for a while. I look at private  
24 market value, and there is a difference.

25           THE COURT: I know. He's asking whether the public

D2jegam1

Gabelli - direct

1 market price reflects the intrinsic value of the security.

2 THE WITNESS: On a given day?

3 THE COURT: Yeah.

4 THE WITNESS: At a given moment?

5 THE COURT: I guess.

6 THE WITNESS: I think it -- at a given moment, like  
7 right now, it's quarter to 3:00. The market's been open since  
8 9:30. If you're trading General Electric, it reflects the full  
9 knowledge of all the dynamics that are taking place at that  
10 moment in time.

11 THE COURT: And so that's not his question. Does it  
12 reflect the intrinsic value of that company or that security?

13 THE WITNESS: I don't look at intrinsic value that  
14 way, so I can't answer that question, your Honor.

15 THE COURT: You can't say yes or no?

16 THE WITNESS: No, I cannot.

17 THE COURT: Whether the public market price reflects  
18 the intrinsic value?

19 THE WITNESS: I believe only at that -- I believe it  
20 reflects the full body of --

21 THE COURT: You said that, available knowledge at that  
22 time, but you won't tell me whether it reflects the intrinsic  
23 value of that.

24 THE WITNESS: I can't answer the question, your Honor.

25 THE COURT: Okay. You can't answer it.

D2jegam1

Gabelli - direct

1 MR. SAUNDERS: All right, your Honor.

2 BY MR. SAUNDERS:

3 Q. Let me ask you if you look at Exhibit J, Defendant's  
4 Exhibit J.

5 MR. SAUNDERS: I believe this is also already in  
6 evidence, your Honor.

7 Q. Do you have this?

8 A. Yes, sir.

9 Q. In your book?

10 A. Yes, sir.

11 Q. Have you seen this before?

12 A. A triangle? Yes.

13 Q. The document.

14 A. Oh, this document?

15 Q. Yes.

16 A. Not from the first page. I mean, I have to --

17 THE COURT: Go ahead.

18 THE WITNESS: Can I?

19 THE COURT: Sure. Flip through it.

20 A. I have seen a document like this, and I think I understand  
21 what it is, but I've not seen this document specifically.  
22 There's so many variations over time.

23 Q. Did you have any role in the creation of this document?

24 A. As far as I can tell, it's a marketing piece prepared by  
25 our institutional department.

D2jegam1

Gabelli - direct

1 Q. And it would be distributed to whom?

2 A. A limited number of prospects that would want our research  
3 services or someone that was looking for an update on our money  
4 management activities.

5 Q. So you're using this to sell your research services to  
6 other investors?

7 A. The institutional relations people would be using it to try  
8 to lay out an -- a primer of what we are offering in terms of  
9 services, yes, sir.

10 Q. All right. If you look at -- very briefly, I'm going to go  
11 through this, page 003, under the heading company background.

12 A. Yes, sir.

13 Q. Is that correct?

14 A. The company background?

15 Q. Yeah.

16 A. Everything on it?

17 Q. Yes.

18 A. Oh, I have to read it.

19 Q. Please.

20 A. I have -- can I ask a question?

21 THE COURT: Sure.

22 A. Since it's 23 years, I assume this is a document you found  
23 somewhere around the year 2000?

24 Q. I believe it was 2001. There's a date on page 005 which  
25 says March 31, 2001.

D2jegam1

Gabelli - direct

1 A. I see. I'm sorry. I didn't get there yet.

2 Okay. That's fine. I -- everything on here would be  
3 reasonably accurate, without me verifying that it's 24 billion  
4 AUMs, assets under management.

5 Q. All right, sir. I'm not going to bother taking you through  
6 the early pages. I do want to direct your attention to page  
7 011. Do you have that?

8 A. Yes, sir.

9 Q. Under the heading philosophy, the sentence reads, quote, in  
10 the tradition of Graham and Dodd, Gabelli Asset Management  
11 employs fundamental research to identify companies with  
12 dominant industry positions that are selling at substantial  
13 discounts to their intrinsic private market value.

14 Do you see that, sir?

15 A. Yes, I do.

16 Q. Is that a correct description of your philosophy?

17 A. No.

18 Q. Why did you put it out?

19 A. I didn't.

20 Q. Somebody did?

21 A. Yes, I agree.

22 Q. Do you know why?

23 A. Why did they put it out? Because they in their mind looked  
24 at this as an example of how they interpreted the philosophy of  
25 the firm.

D2jegam1

Gabelli - direct

1 Q. Did you ever tell anyone in your firm that it was  
2 inaccurate to describe private market value as an intrinsic  
3 value?

4 A. I do not have to, because it's baseball and basketball.  
5 It's different sports.

6 THE COURT: All right. So let me just understand. I  
7 got to understand. So the only thing that's inaccurate about  
8 this sentence is the use of the word intrinsic? If that were  
9 X-ed out, would the sentence be correct? Could you help me  
10 out?

11 THE WITNESS: Yes, your Honor. I --

12 THE COURT: Please. If that one word wasn't there,  
13 would the sentence be accurate? Would you look at it?

14 THE WITNESS: Yes, I did, your Honor. There's one  
15 other word I would X out.

16 THE COURT: What's that?

17 THE WITNESS: Dominant.

18 THE COURT: Okay. With those two words X-ed out --

19 THE WITNESS: Yes.

20 THE COURT: -- the sentence would be accurate?

21 THE WITNESS: Yes.

22 THE COURT: Thank you.

23 BY MR. SAUNDERS:

24 Q. All right. Did you ever write an article for a magazine  
25 called Cigar Aficionado?



D2jegam1

Gabelli - direct

1 A. Yes. I wrote many articles for Cigar Aficionado.

2 Q. All right. Would you look, please, at Defendant's  
3 Exhibit Z.

4 MR. SAUNDERS: I believe this is already in evidence,  
5 your Honor. This is an annual report dated December 31, 2001,  
6 for the Gabelli Asset Fund.

7 Q. Do you have it?

8 A. Yes, I do.

9 Q. On page 033 under the heading -- let me ask you about page  
10 032 first. Page 032 says, back to basics. And then there is  
11 some photographs and pictures. And the heading, it says,  
12 earnings plus interest rates plus Mr. Market equals question  
13 mark.

14 Do you see that?

15 A. Yes, sir.

16 THE COURT: You do?

17 Q. Who or what is Mr. Market?

18 A. Without being precise, it is the name applied to the daily  
19 fluctuations in the stock market due to psychological behavior  
20 and other elements by Professors Graham and Dodd in their book  
21 on 1934. And that's my best recollection and best way to  
22 articulate it today.

23 Q. So would it be fair to say that Mr. Market is their -- the  
24 word that they use for the public stock market?

25 A. I don't want to speculate on that. I don't know. It is

D2jegam1

Gabelli - direct

1 basically an individual or an entity -- I can describe it but I  
2 can't tell you whether that's their best description.

3 Q. Have you ever used that phrase to describe the public stock  
4 market?

5 A. Mr. Market?

6 Q. Yes.

7 A. I -- I'd answer your question. Can I answer it my way?

8 Q. If you can answer it my way first, I'd be happy to have you  
9 explain in any way you like.

10 THE COURT: I think he just asked if you ever used  
11 that phrase in an article you wrote.

12 THE WITNESS: I have talked about --

13 THE COURT: No. No. Have you ever used that phrase  
14 in an article you wrote?

15 THE WITNESS: After 45 years --

16 THE COURT: You don't know?

17 THE WITNESS: I may have.

18 THE COURT: All right.

19 BY MR. SAUNDERS:

20 Q. Look at page 033.

21 A. Yes, sir.

22 Q. The heading on this page says, earnings, interest rates,  
23 investor psychology and the stock market. Then underneath that  
24 it says, prepare for Cigar Aficionado by Mario J. Gabelli.

25 Do you see that, sir?

D2jegam1

Gabelli - direct

1 A. I see it.

2 Q. Is this the text of an article that you prepared for Cigar  
3 Aficionado?

4 A. I have written or prepared --

5 THE COURT: No, no, that's not the question.

6 A. I --

7 THE COURT: Do you know if this is the text of an  
8 article you wrote for Cigar Aficionado?

9 THE WITNESS: You know, I can't remember, but my name  
10 is on it, and I have had help preparing and editing articles in  
11 the past. And this may be one of those.

12 Q. By allowing your name to be put on it, did you adopt it as  
13 yours?

14 A. I don't understand the question.

15 THE COURT: Well, by letting it be published as an  
16 article by Mario J. Gabelli, did you acknowledge it as yours?

17 THE WITNESS: I never wrote to anyone telling them  
18 it's not something I can live with. I probably didn't read it  
19 after it was published anyway.

20 THE COURT: That's not the question.

21 THE WITNESS: I know.

22 THE COURT: If it says by Mario J. Gabelli, do you  
23 understand and accept that it's yours?

24 THE WITNESS: I have never refuted that it was mine.

25 THE COURT: Oh, good. He's not refuted it was his.

D2jegam1

Gabelli - direct

1 BY MR. SAUNDERS:

2 Q. If you look at the last paragraph under the heading  
3 Mr. Market, do you see that?

4 A. You're going to have to slow down a little bit here to let  
5 me read it.

6 Q. Sure. Please.

7 THE COURT: It starts with, it is our and every  
8 prudent investor's job to try to determine the intrinsic value  
9 of an individual company or the market as a whole. At any  
10 given point in time, intrinsic value is largely a function of  
11 earnings and interest rates. Whether stocks trade at, above or  
12 below intrinsic value is a function of investor psychology.  
13 Mr. Market is the code name the traditional value investor uses  
14 to personify investor psychology.

15 Q. Is that sentence an accurate reflection of your view in the  
16 2001 time period?

17 A. The sentence is accurate.

18 Q. I'm sorry?

19 A. The sentence is accurate about what Mr. Market is.

20 Q. Okay. When you refer to investor psychology in that  
21 sentence, what do you mean?

22 A. If an investor goes home, has a house and decides to drink  
23 heavily and sells the house for 100,000 in a neighborhood where  
24 the lowest priced houses in the last ten years have sold for  
25 \$500,000, that is what we call investment psychology; so that

D2jegam1

Gabelli - direct

1 you would sell a stock and just dump it on the market where it  
2 was not priced efficiently.

3 Q. That's what you mean by investor psychology?

4 A. That's not what I mean. That's what I'm interpreting  
5 Graham and Dodd. This is a Graham and Dodd statement,  
6 plagiarism probably.

7 Q. This is not your statement?

8 A. It is -- this sentence is an echoing by me of what Graham  
9 and Dodd would have articulated in an extraordinarily eloquent  
10 academic, and I could not improve on it.

11 Q. All right. Well, the preceding sentence says, and I quote,  
12 whether stocks trade at, above or below intrinsic value is a  
13 function of investor psychology.

14 Do you see that, sir?

15 A. Yes, sir.

16 Q. Does that suggest that the market -- the public market  
17 price might not be an accurate reflection of intrinsic value,  
18 depending upon investor psychology?

19 A. On a given day, the market knows everything that exists to  
20 the degree that that price in the public market reflects that,  
21 that would reflect all of the elements. For example, when  
22 President Eisenhower got assassinated -- not assassinated, had  
23 a heart attack, the market dropped sharply. And it reflected  
24 that dynamic.

25 Q. I'm sorry. I'm not asking you about what the market knows.

D2jegam1

Gabelli - direct

1 I'm simply asking you whether the public market price might or  
2 might not be a reflection of intrinsic value, depending upon  
3 investor psychology, as you use that phrase.

4 A. I have no idea what you're talking about. I can't answer  
5 that question. I don't know -- you've got oranges, apples,  
6 cider and grapefruits mixed up.

7 Could I read something for you?

8 THE COURT: No.

9 THE WITNESS: No, sorry.

10 Q. Let me try it this way: Are intrinsic values and equity  
11 pricing the same thing?

12 A. I don't understand the question.

13 THE COURT: He's giving you two words and asking if  
14 they're the same or different.

15 THE WITNESS: I just lost.

16 Q. By equity pricing, I mean equity pricing in a public  
17 market. Is equity pricing used in that sense the same as or  
18 different from intrinsic value?

19 A. At a given moment in time, Google today is trading at \$801.  
20 Is that the same as intrinsic value?

21 THE COURT: That's his question.

22 THE WITNESS: Is that your question?

23 THE COURT: Yes.

24 THE WITNESS: Sorry, your Honor. Sorry.

25 THE COURT: Is it?

D2jegam1

Gabelli - direct

1 THE WITNESS: At that moment in time it reflects  
2 everything that's going on --

3 THE COURT: You told us that four or five times. Is  
4 it intrinsic value?

5 THE WITNESS: I don't use the word intrinsic value.

6 THE COURT: You did use the word intrinsic value,  
7 actually, in your article. That's why he's asking on that.

8 THE WITNESS: Thank you for embellishing.

9 THE COURT: I don't think I'm embellishing. It's your  
10 article. I'm asking you whether that's the same as intrinsic  
11 value. The \$801 price, is that the same intrinsic value in the  
12 example you gave on Google?

13 THE WITNESS: Intrinsic value is largely a function of  
14 earnings and interest rates. I'm reading. That moment in time  
15 in which the stock trades at \$801, that is a function of all of  
16 the elements that the market knows that is public information  
17 at that time with a large number of buyers and sellers.

18 THE COURT: And now maybe you'll answer the question.  
19 Is it the intrinsic value?

20 THE WITNESS: See, I --

21 THE COURT: You can say yes or you can say no.

22 THE WITNESS: I could also say I don't know.

23 THE COURT: Okay. If that's your answer, I'll take  
24 it.

25 THE WITNESS: I can't answer it, your Honor, because

D2jegam1

Gabelli - direct

1 it's not the way I've been trained for 50 years.

2 THE COURT: So the answer is I don't know?

3 THE WITNESS: I just can't respond to the yes or no  
4 answer.

5 THE COURT: You already told us that. Is it I don't  
6 know?

7 THE WITNESS: No, I can't answer that either that way.

8 THE COURT: Okay.

9 THE WITNESS: It's just not consistent with everything  
10 I've been trained for 45 years to know how to think.

11 THE COURT: Oh.

12 BY MR. SAUNDERS:

13 Q. All right. Sir, would you look at page 035 and Exhibit Z  
14 under the heading investor psychology, the three sentences in  
15 that first paragraph.

16 THE COURT: Which read, of course intrinsic value and  
17 equities pricing are horses of two very different colors.  
18 Remember the emotional Mr. Market often values stocks  
19 materially above and substantially below intrinsic value. So,  
20 investor psychology will have a major impact on market trends  
21 in the year ahead.

22 You do see the sentence, right?

23 A. Yes, I do.

24 (Continued on next page)

25



D2jrgam2

Gabelli - direct

1 Q. Is that sentence an accurate reflection of your investment  
2 philosophy or methodology?

3 A. No.

4 Q. It's not?

5 A. No.

6 Q. Do you know why that appears in this marketing brochure  
7 issued by the Gabelli Asset Fund in 2001?

8 A. I thought you indicated that it was an article --

9 THE COURT: No, no longer. Is this still part of the  
10 article? You tell us, is this still part of the article you  
11 authored?

12 THE WITNESS: I didn't author it completely, because I  
13 wouldn't use "horses of a different color." I believe it is,  
14 your Honor.

15 THE COURT: All the more the question is a good one.  
16 This is your article. You wrote it. Is it inaccurate, this  
17 sentence, or is it accurate?

18 THE WITNESS: I would say it is not completely the way  
19 I think.

20 THE COURT: In what way is it accurate? Is it  
21 accurate to say intrinsic value and equities pricing are  
22 different?

23 THE WITNESS: Yes.

24 BY MR. SAUNDERS:

25 Q. Did you ever describe Mr. Market as irrational?

D2jrgam2

Gabelli - direct

1 A. Yes, I would say that I would do that.

2 Q. What does that mean?

3 A. It would be like your neighbor coming home drunk and  
4 selling his house \$500,000 below what the house is worth for  
5 the last five years in the neighborhood.

6 Q. Is that the way you describe the public stock market?

7 A. No. That's the way I would describe occasionally a stock  
8 or a company. I don't comment generally on -- again, this is  
9 today or the last 20 years, 10 years.

10 Q. Let me try it again. Did you ever describe Mr. Market as  
11 irrational?

12 A. Yes.

13 Q. What does that mean?

14 A. Let me try it again as well. The analogy I like to use is  
15 an individual has a home in a neighborhood --

16 THE COURT: We are not talking about an individual.  
17 We are talking about the stock market, Mr. Market. When Mr.  
18 Market is described as irrational, does that describe the stock  
19 market price, the price set by the market is irrational?

20 THE WITNESS: At a moment in time it could be. I  
21 could accept that description for a moment in time, for an  
22 hour, 15 minutes, one minute, a trade.

23 THE COURT: OK.

24 Q. If you would look at Exhibit D, in particular page 017,  
25 which is page 11 of the document.

D2jrgam2

Gabelli - direct

1 THE COURT: Let's start at the beginning. This is  
2 another annual report of Gabelli Asset Fund, December 31, 2000.

3 MR. SAUNDERS: Yes, your Honor.

4 THE COURT: Then you want to turn to page 11 of that  
5 annual report.

6 MR. SAUNDERS: Page 11 of the document and page 17 of  
7 the Bates numbers.

8 THE COURT: There is a signature there. Do you see  
9 it?

10 THE WITNESS: Yes, I do, your Honor.

11 THE COURT: Do you recognize it?

12 THE WITNESS: It is a facsimile of one of the many  
13 signatures that I use that are on file for me.

14 Q. In the second sentence under the heading "In Closing," you  
15 write, "At times we may be faced with a challenge in reaching  
16 our objective because of the irrationality of Mr. Market." Do  
17 you see that?

18 A. I see the sentence, but I don't like your preamble.

19 THE COURT: You don't like what preamble?

20 THE WITNESS: The first several words that said I  
21 wrote.

22 THE COURT: Apparently, your signature appears at the  
23 end. "Sincerely, Mario J. Gabelli," and a facsimile of your  
24 signature, right? That much is true?

25 THE WITNESS: I agree. We have 23 mutual funds that

D2jrgam2

Gabelli - direct

1 write quarterly letters. I edit them. I don't microscopically  
2 edit them. I get the flow.

3 THE COURT: Anyway, that sentence does appear over  
4 your signature?

5 THE WITNESS: Yes, it does.

6 Q. Is it the case that Gabelli enterprises were facing  
7 challenges in reaching their objectives because of the  
8 irrationality of Mr. Market?

9 A. I really don't understand the question. Say it again  
10 slowly.

11 THE COURT: Take a look at the sentence while he  
12 repeats his question.

13 Q. I'm basically asking whether that sentence is true.

14 A. At any moment in time. The statement itself at any moment  
15 in time is true.

16 Q. A slightly different topic. I'm going to show you two  
17 documents. They are similar. One is Defendant's Exhibit G in  
18 evidence and one is Defendant's Exhibit N in evidence.

19 A. Yes, I found them.

20 THE COURT: To make it clear, G is the annual planning  
21 seminar, January 13, 2001, Greenwich library. N is the 16th  
22 annual meeting at the Pierre Hotel, May 12, 2001, so five  
23 months later.

24 THE WITNESS: Thank you, your Honor.

25 THE COURT: You're welcome.

D2jrgam2

Gabelli - direct

1 THE WITNESS: Yes.

2 Q. Mr. Gabelli, did you attend both of those meetings?

3 A. Yes.

4 Q. Would it be fair to say that the annual planning seminar  
5 was primarily an internal meeting and that the annual meeting  
6 at the Pierre Hotel was primarily an external meeting?

7 A. Yes.

8 Q. I want to ask you about two charts that appear in both the  
9 internal presentation on the one hand and the external  
10 presentation on the other hand. In Exhibit G it's the chart  
11 that says --

12 THE COURT: What would be the Bates number on that?

13 MR. SAUNDERS: The Bates number would be GAMCO file  
14 80.0114.

15 THE COURT: Way toward the back, right? OK.

16 Q. There is what I believe to be an identical chart in  
17 Exhibit N, which would be page 050.

18 A. Can I look at one at a time?

19 MR. CAPPUCCI: Your Honor, I have to make objection  
20 here.

21 THE COURT: They are exactly identical. Take a look  
22 at them before you object.

23 MR. CAPPUCCI: Please hear me out on my objection. It  
24 is a very lengthy document.

25 THE COURT: It doesn't matter. He wants him to look

D2jrgam2

Gabelli - direct

1 at a chart in both. If you would do it as I did, you would see  
2 it as identical.

3 MR. CAPPUCCI: I understand but --

4 THE COURT: There is nothing more to say right now.  
5 His only point is that the private chart appears at both the  
6 private meeting and the public annual meeting. Mr. Saunders  
7 hasn't asked anything else yet. Let's see what he does ask.  
8 You might have an objection. So far we have an identical  
9 chart.

10 THE WITNESS: Your Honor, for lack of a better term,  
11 what page was it under N?

12 THE COURT: In N it was 50, 0050.

13 THE WITNESS: I assume it is identical.

14 THE COURT: It is. I checked it. It's identical.  
15 But you're welcome to check it.

16 THE WITNESS: No, no. Go ahead, keep going.

17 THE COURT: 0050. Take a look.

18 THE WITNESS: I just want to get to the page before he  
19 asks a question on both.

20 THE COURT: OK.

21 A. OK. Thank you.

22 Q. My question is, what does that chart represent? What is  
23 it?

24 A. Without seeing everything else, just looking at that chart,  
25 I didn't prepare it, so I don't know what it -- my sense is I'd

D2jrgam2

Gabelli - direct

1 have to read everything in the context of which it was. If I  
2 can describe it as a layman, as a professional, it says E73  
3 content, connectivity, other, PMV, shares outstanding, private  
4 market value per share, not intrinsic value but private market  
5 value 100.

6 MR. CAPPUCCI: Your Honor, may I have a moment with  
7 counsel?

8 THE COURT: Sure.

9 (Counsel conferred.)

10 MR. CAPPUCCI: Thank you, your Honor.

11 Q. Mr. Cappucci asked me to show the three pages that precede  
12 this. If you look at pages beginning at 042.

13 THE COURT: In which one?

14 MR. CAPPUCCI: In Exhibit N.

15 THE COURT: N, the later one?

16 MR. CAPPUCCI: I think that is easier to read.

17 THE COURT: All right, 042. The one that says  
18 "Investment process"?

19 MR. SAUNDERS: "Investment process," yes.

20 THE COURT: Two words, "Investment process."

21 Q. Do you see that? Mr. Cappucci wants you to look at that  
22 and the next few pages to familiarize yourself with what the  
23 document is. Let me ask you, is this an accurate description  
24 of the Gabelli investment process?

25 THE COURT: You want him to look at 042, 043, 044, 45,

D2jrgam2

Gabelli - direct

1 46, 47, 48, 49?

2 MR. SAUNDERS: Yes. Up to 50 is sufficient for me.

3 THE COURT: We just did it. At least I did it. I  
4 don't know if the witness is finished.

5 A. Can you repeat the question?

6 THE COURT: He wants you to look at 42 through 49.  
7 Have you had a chance to do that?

8 THE WITNESS: Yes, ma'am.

9 THE COURT: Have you finished going through these  
10 pages, 42 to 49?

11 THE WITNESS: Yes.

12 THE COURT: You had a question.

13 Q. My question is, do those pages accurately describe the  
14 Gabelli investment process?

15 A. Not word for word, but by and large.

16 Q. By and large, OK. On page 044, under the heading  
17 "Investment process" --

18 A. Yes.

19 Q. -- the chart says, "Identify intrinsic value of each  
20 business."

21 A. Yes.

22 Q. Is that the same as the private market value?

23 A. No. I indicated to you just 30 seconds ago that by and  
24 large. This is one of the elements that if I were to tweak it  
25 or sculpture it and if I focused on it, I would change the PMV.



D2jrgam2

Gabelli - direct

1 Q. Is it a fair assumption that the person who wrote this  
2 intended to portray the intrinsic value as the private market  
3 value?

4 A. I don't know who wrote it.

5 Q. I didn't ask you that.

6 A. I don't know. I can't answer that. I don't want to  
7 speculate on that. If it said PMV, we would have no  
8 discussion.

9 Q. Then you see the next page says "EBITDA," and the next page  
10 says "PMV," which I take it means private market value.

11 A. Yes.

12 Q. The next page says, "Select stocks with a 2-year 50 percent  
13 return potential"?

14 A. Yes.

15 Q. What does that mean?

16 A. Which page, sir?

17 Q. Page 047.

18 A. When we started the firm -- the only way I can describe it  
19 is a motion picture -- in 1977, nobody wanted stocks. So we  
20 said we wanted to generate a real rate of return of 10 percent  
21 plus inflation. We would do that by finding companies that at  
22 the time, when inflation was 10 percent and taxes were like 30  
23 percent on long-term capital gains, we would earn for you 50  
24 percent within a 2-year time frame. That dynamic of 1977 in  
25 the different world of 2000 changed. That statement, however,

D2jrgam2

Gabelli - direct

1 was kept as part of our legacy.

2 Q. Would it be fair to say that in your investment philosophy  
3 is to invest in companies with respect to which there is a  
4 catalyst that would cause the public market price to increase  
5 by 50 percent over 2 years?

6 A. No.

7 Q. It would not be correct?

8 A. No, not today.

9 Q. Was it correct in 2001?

10 A. It was correct in 1977. By 2001 the markets were down  
11 sharply. You might be able to achieve that, but the goal was  
12 to be able to generate 10 percent rates of return. That was  
13 objective number one.

14 Q. So why is this page in the document that was used both in  
15 the internal planning session and in the external meeting?

16 A. That is a great question. The reason for that is that the  
17 scribe who prepares it, including myself, goes through lots of  
18 documents, lots of meetings. We don't sit down and spend days  
19 and days. We take what is in the library and hit buttons and  
20 just reproduce them. So to the degree that nobody objected to  
21 it, it would survive. It basically goes back to 1977, when the  
22 firm was started.

23 Q. When you saw this page, did you object to it?

24 A. I don't even think I was looking at it. If I wrote it or  
25 spoke about it, I would not articulate it.

D2jrgam2

Gabelli - direct

1 Q. If you look at page 049.

2 A. Yes.

3 Q. Still in Exhibit N.

4 A. Yes.

5 Q. Do you see that, sir?

6 A. I see it here.

7 Q. Would you explain to the Court what that page is meant to  
8 represent.

9 A. I have no idea. I would have to think about it. I would  
10 not use this in anything I've ever done in 40 years in terms of  
11 a page like this. Or 50 years, whatever it is.

12 Q. You have no idea what this page represents?

13 A. No, I didn't say that. You recharacterized the specific  
14 nature of my comments. I said I did not use a page like this  
15 nor would I use a page like this in talking and the speeches I  
16 give, the television appearances I give. I would have to  
17 understand it by looking at it.

18 THE COURT: You're looking at it.

19 THE WITNESS: I understand, but I can't figure it out.

20 THE COURT: You can't?

21 THE WITNESS: No. It takes a little while. It says  
22 buy/sell stock price. I have no idea.

23 THE COURT: It says at the top, "PMV versus Mr.  
24 Market: The Graham and Dodd approach."

25 THE WITNESS: Yes.

D2jrgam2

Gabelli - direct

1 THE COURT: You still can't figure it out?

2 THE WITNESS: No, because I don't know what the dotted  
3 line is.

4 THE COURT: If you can't figure it out, Mr. Gabelli,  
5 apparently you can't.

6 Q. Let me try to help you, Mr. Gabelli. Does this chart make  
7 sense to you if you assume that the solid line with the arrows  
8 on each end is the private market value and the dotted line is  
9 the public market price?

10 A. If that were the case, this is good.

11 Q. So that might in fact be the case? That would explain the  
12 chart then, right?

13 A. Let me see if I understand this. If you have a solid line  
14 that says private market value and the other line is the stock  
15 price, in theory you buy below the private market value and  
16 sell it if it goes above. I cannot do anything but subscribe  
17 to that.

18 MR. SAUNDERS: I have no further questions, your  
19 Honor. Thank you.

20 THE COURT: Thank you, Mr. Saunders.

21 Mr. Cappucci?

22 MR. CAPPUCCI: Your Honor, can we take a two-minute  
23 break, please?

24 THE COURT: Sure.

25 (Recess)

D2jrgam2

Gabelli - direct

1 CROSS-EXAMINATION

2 BY MR. CAPPUCCI:

3 Q. Mr. Gabelli, thank you. I want to ask you, what is your  
4 definition of intrinsic value?

5 A. My definition is what the academics wrote, what I learned  
6 from Roger Murray. That is the intrinsic value is the present  
7 value of the future stream of cash flow that one has in an  
8 enterprise, a company.

9 Q. When you use the term "intrinsic value," you are not  
10 relating it in any to market price, is that correct?

11 A. No.

12 Q. When you use the term "intrinsic value," you're not  
13 referring in any way to the market value of a stock less  
14 inflation? Do you know what that means?

15 A. No.

16 Q. Inflation?

17 A. I understand inflation. Private market value is intrinsic  
18 value plus a take-out premium for somebody buying the entire  
19 control of a company.

20 Q. I want to get back to your usage and understanding of the  
21 term "intrinsic value." I think you're agreeing with me. What  
22 I think you're saying, and I'll ask you this, when you use the  
23 term "intrinsic value," do you deem that to mean the market  
24 price of a security less artificial inflation for whatever  
25 reason? Yes or no.

D2jrgam2

Gabelli - cross

1 A. I have not thought about the question or that dynamic in  
2 that fashion, so I really am not in a position to really chisel  
3 in an answer.

4 Q. Have you ever heard the term "true value"?

5 A. Yes, when I shop at a store in Scarsdale.

6 Q. Have you ever heard the term "true value" as it would refer  
7 to the market price of a security less artificial inflation?

8 A. Not something that I have thought about or heard.

9 Q. That's fine.

10 A. I may have heard it, but I don't use it.

11 Q. That's fine. Do you recall whether you considered private  
12 market value in connection with your decision to purchase  
13 Vivendi securities during the relevant period?

14 A. Can you define what the relevant period is? We haven't  
15 heard that today.

16 Q. We are talking about October of 2000 through August of  
17 2002.

18 A. Yes.

19 Q. Can you be more specific as to the level of involvement  
20 that PMV played in your overall investment decision during that  
21 period.

22 A. We are trained to look at a motion picture of a company.  
23 What is the value today, the private market value today, and  
24 what are the elements that influence that over time. It really  
25 goes back to what does a Henry Kravis use in his mosaic to buy

D2jrgam2

Gabelli - cross

1 the company and how does that change. So it's a parfait that  
2 changes over time. So we look at it but it does not apply to a  
3 lot of companies. Not all, but a lot.

4 THE COURT: I think his question was, did you look at  
5 private market value in determining whether to purchase Vivendi  
6 from 2000 to 2002?

7 THE WITNESS: Thank you, your Honor. It is always an  
8 element in the mosaic of what I as a portfolio manager, as an  
9 analyst, look at. It is one of the many elements, not  
10 necessarily always the determining element.

11 Q. Let's talk about the other elements. If you can just  
12 briefly describe to the Court, what would you look at? This  
13 case is about your investment in Vivendi securities. What  
14 would you look at to make an investment decision in Vivendi  
15 securities during this relevant period, if you recall?

16 A. Assuming I had one client and I understood all the needs of  
17 that client as opposed to the 1700 clients that we actually  
18 have entrusted assets to us, we would look at the dynamics of  
19 the world at large. We would look at elements in politics. We  
20 would look at the global marketplace. We would look at things  
21 internal to the industry and then internal to the company. So  
22 the way we think is like a McKinsey thinking out over the next  
23 five or ten years. We function also as investors over a period  
24 of time, and then we function like hedge funds that watch  
25 everything daily.

D2jrgam2

Gabelli - cross

1 Q. What about your evaluation of price? What kind of analysis  
2 would you have performed with respect to price?

3 A. The price to us is a function of the price in the open  
4 market daily as opposed to private market value, which does not  
5 move as frequently as the underlying value of the enterprise.

6 Q. Is there reliance on price in any respect in an investment  
7 decision?

8 A. At a given moment of time it's like the old garment  
9 district worker. He says he has to buy right to get that extra  
10 return. He knows what his selling price is going to be in  
11 theory, and even that moves. So we have to be careful about  
12 the public price when we execute an order on a given moment of  
13 time, and the elements during that day and that hour and that  
14 moment in which that trade is taking place.

15 Q. At the precise moment that you decide to purchase a  
16 security, and let's keep this within the relevant period, when  
17 you decide to purchase a security at a specific time, what kind  
18 of price assessment do you perform? What do you think about?

19 A. A new client comes in, gives us a portfolio. We look at  
20 how to diversify, what are the client's standards. Then we  
21 pick stock specifics that fill that mandate that also meet our  
22 requirements for risk-adjusted rates of return, and then we  
23 look at the price at that moment.

24 Q. What did stock integrity? Do you have an understanding of  
25 what that means?



D2jrgam2

Gabelli - cross

1 A. No. Price integrity at a given moment in time?

2 Q. Yes, at a given moment in time.

3 A. As a professional, I would interpret that to mean that  
4 everything that is known about the stock price in a very liquid  
5 stock is known by the marketplace and that stock reflects the  
6 common knowledge that is available at any given moment in time.

7 Q. Why does that happen in a marketplace?

8 A. Why does what happen?

9 Q. Why does the stock reflect the information in the  
10 marketplace? Why does that happen?

11 A. It's basic supply/demand. A large number of buyers and  
12 sellers come to a marketplace where there is integrity of  
13 information, integrity of the marketplace. That is preserved  
14 in the capital system.

15 Q. During the relevant period, Vivendi ADRs, do you recall  
16 what they traded on?

17 A. I would say the New York Stock Exchange.

18 Q. Were they heavily followed by institutions?

19 A. Yes.

20 Q. Was the company high profile in the news during this  
21 period?

22 A. The entertainment industry, the movie companies are, and  
23 this company was, yes.

24 Q. Were the shares actively traded, as you recall, during  
25 2002?

D2jrgam2

Gabelli - cross

1 A. I can't be specific, but think the answer is yes.

2 Q. So would you have an expectation that there would be  
3 enhanced price efficiency as a result of the dynamics that were  
4 occurring at this time with respect to Vivendi ADRs in the  
5 marketplace?

6 A. I don't know what the word "enhanced" means. What does  
7 that mean?

8 Q. In other words, would there be more likelihood that the  
9 information would be vetted and processed in the marketplace?

10 A. The market would have a large number of buyers and sellers.  
11 There was what some would describe, not me, as an efficient  
12 price daily on the marketplace based on the common state of  
13 knowledge.

14 Q. Before you executed or directed a transaction in Vivendi  
15 securities during the relevant period, would you have reached  
16 the decision that the price was informationally efficient at  
17 that moment?

18 A. Yes.

19 Q. Would you have reach the decision or formed a belief that  
20 the price had integrity at that moment?

21 A. The price had integrity?

22 Q. As we have just discussed.

23 A. Oh, yes.

24 Q. Would you buy a stock in a company that you knew where the  
25 price was inflated as a result of a management fraud?

D2jrgam2

Gabelli - cross

1 A. Having limited time --

2 Q. Yes.

3 A. -- that when I knew it was inflated and that inflation  
4 still existed? It's possible, but very unlikely. I'd assign a  
5 90-10 probability. There would have to be a lot of other  
6 circumstances.

7 Q. Did you have any reason to believe that Vivendi shares  
8 during the relevant period were inflated on the market itself?

9 THE COURT: You're talking almost a 2-year period. At  
10 any time during those two years did you come to learn that  
11 there was any inflation, artificial inflation, in that stock  
12 price? Did you come to learn that at any time in those whole  
13 two years?

14 THE WITNESS: Your Honor, I need those dates again.

15 THE COURT: October 2000 to August 2002.

16 THE WITNESS: Yes, I did know that that occurred,  
17 because that information came out. I only refreshed myself in  
18 reading some background material for today.

19 Q. But after corrective disclosure --

20 MR. SAUNDERS: Could we have the witness's complete  
21 answer, your Honor, please?

22 THE COURT: Yes.

23 THE WITNESS: I only refreshed myself from reading  
24 some background material for today on a flight from wherever I  
25 was yesterday to look at some time frames. I believe that that

D2jrgam2

Gabelli - cross

1 information concerning the individual involved who had departed  
2 occurred like in the tail end of that relevant period you  
3 described. You described it as a block of time from somewhere  
4 in '00 --

5 THE COURT: October 2000 to August 2002.

6 THE WITNESS: Right. It was in the early part of July  
7 of 2002.

8 MR. CAPPUCCI: I'm just trying to move along, your  
9 Honor. I'm sorry for cutting you off.

10 Q. My question is, would you have bought Vivendi ADRs during  
11 the relevant period knowing or believing that further negative  
12 information was about to occur which would cause a negative  
13 decline in the price of the ADRs?

14 MR. SAUNDERS: Your Honor, I'm going to object to that  
15 question.

16 THE COURT: Sustained. That really calls for  
17 speculation.

18 Q. Did you? Did you purchase?

19 A. Did I buy the stock? I did buy the stock, yes.

20 Q. Did you buy Vivendi ADRs during the relevant period with  
21 knowledge that the market price was inflated due to management  
22 misrepresentations?

23 A. No.

24 Q. Mr. Gabelli, while you were not here, there was some  
25 testimony about the access you had to management at meetings

D2jrgam2

Gabelli - cross

1 that you and perhaps some of your staff, including Mr.  
2 Rittenberry and your son had with Mr. Messier. How would you  
3 describe your access to management -- and I realize this is  
4 some time ago -- during the relevant period, which is the end  
5 of 2000 to 2002?

6 A. Companies either call us and say we're coming into town,  
7 the management, in this particular case the management could be  
8 in from Paris, come and visit us, we are blocking out a block  
9 of time for you. I get invited. That's the access. We have  
10 that with many companies. That is reasonably traditional in  
11 what goes on in terms of gathering data.

12 Q. Sir, have you had an opportunity to look back to see the  
13 nature of the purchase activity was for the funds that you  
14 performed services for?

15 A. In Vivendi during what period?

16 Q. Yes, in Vivendi.

17 A. In what period?

18 Q. 2002.

19 A. What I reviewed last night was early June to July, end of  
20 July, or maybe even early August. Actually, it could have been  
21 even longer than that afterwards.

22 Q. Did you find or identify any event which refreshed your  
23 recollection as to why you purchased the stock within that  
24 period?

25 A. That's a broad question. I did look at my calendar today

D2jrgam2

Gabelli - cross

1 in terms of my travel schedule. I was in California-Wyoming  
2 the week before. Then I went to a TV show on Monday June  
3 1st -- July 1st with Maria Bartiromo. There may have been -- I  
4 started buying it that morning, perhaps getting ready for  
5 Maria's show, because I knew she was sensitive about the  
6 entertainment business. In looking at some other documents,  
7 there was also speculation that Mr. Messier was resigning.

8 Q. Was that one of the factors which you believe in retrospect  
9 led to an investment decision?

10 A. That catalyst, as we discussed earlier in the day,  
11 management change being a catalyst, that was an element.  
12 Without being specific, that could have been one of the  
13 elements in the mosaic.

14 Q. Let me go back to PMV, if I may, for one moment. There was  
15 prior testimony yesterday by Mr. Rittenberry about the model.  
16 In terms of how you used it on a daily basis, what your  
17 practice would have been during this period, when you sit down  
18 and decide to make an investment decision, do you have the PMV  
19 model and the PMV values right next to you to compare against  
20 market price?

21 A. To describe the process of what occurs, because I did it  
22 this morning for two hours before coming down here, you have a  
23 large number of portfolios. Client that are new get priority  
24 first, clients that have extra cash or are under investigation  
25 to look at new ideas, to sell things. We have 1700 separately

D2jrgam2

Gabelli - cross

1 managed accounts that I am responsible for. There are on  
2 average 150 stocks. That's whatever the number of  
3 combinations. I don't keep a database. We own over 5 percent  
4 of about 130 companies for our clients. I don't keep a  
5 database at my fingertips.

6 Q. A database of PMV?

7 A. Of spreadsheets, of the top sheet of PMVs, on my  
8 fingertips. I rely on an ability to call people. Or if they  
9 are not in, you kind of have a broad guess, like --

10 THE COURT: My question is, are you always interested  
11 in the spread between the PMV and the public market price?

12 THE WITNESS: Your Honor, yes, I am interested in a  
13 margin of safety. But I am also interested in the price that  
14 day given all of the dynamics that are occurring. We have a  
15 morning meeting, today they probably went over 35 companies,  
16 which I wasn't on.

17 THE COURT: You do say you are interested in this  
18 spread between the PMV and the public market price?

19 THE WITNESS: We like a margin of safety.

20 THE COURT: What is this new word that I haven't heard  
21 in this trial till now? What is this new word "margin of  
22 safety"? I thought you were interested in the discount.  
23 That's what all the materials talk about, the discount between  
24 the private market value and the public price.

25 THE WITNESS: In my lexicon I call that the margin of

D2jrgam2

Gabelli - cross

1 safety.

2 THE COURT: That's the same as the discount?

3 THE WITNESS: Yes.

4 THE COURT: Good. Thank you.

5 THE WITNESS: That's what I would call it.

6 THE COURT: That's helpful.

7 THE WITNESS: Thank you, your Honor.

8 Q. Mr. Gabelli, before her Honor asked you this question, you  
9 said that PMV was not a determinant. What does that mean? Can  
10 you please amplify that for us.

11 A. As I indicated today, we will buy, I'm buying and will buy  
12 millions of shares of Heinz that's selling at \$72.18 when I  
13 left the office today with Buffett and 3G buying at 72.50, when  
14 our analysis would indicate it was fully priced. There is an  
15 element, a possibility, that I can get a higher rate of return  
16 because someone else will top the bid. There are occasions,  
17 and that's an exception, but there are occasions which I will  
18 buy a stock above its PMV.

19 Q. What other factors are you looking at when you make an  
20 investment decision? If you can, expand upon that for the  
21 Court.

22 A. It is an entire mosaic: What is the stock price trading  
23 today? what is happening to interest rates? what is tax  
24 structure? who are the logical buyers? what are the elements  
25 that they have? how many deals are being done in a given area?



D2jrgam2

Gabelli - cross

1 what is going within the context of mergers and acquisitions?  
2 why are central strategic buyers looking at an area? what's  
3 going on in the sector where we have a core competency, where  
4 we have a knowledge of a given industry.

5 Q. Critical to that process is your reliance on price, on  
6 market price, correct?

7 A. It is an important element. But, again, it's not the  
8 determining element, just like PMV is not.

9 MR. CAPPUCCI: We understand. Thank you. That's it.  
10 No further questions, your Honor.

11 THE COURT: Thank you. Mr. Saunders.

12 **REDIRECT EXAMINATION**

13 BY MR. SAUNDERS:

14 Q. Mr. Gabelli, you testified that you learned about some  
15 Vivendi misstatements in July of 2002. Did I understand that  
16 correctly?

17 A. Yes. In refreshing myself for today, I realized that I was  
18 on a show with Maria Bartiromo on Monday night. I had just  
19 flown back from the West Coast and was getting ready for the  
20 dynamics. There were subsequent events, both on that day and  
21 subsequently, dealing with Mr. Messier's reign at Vivendi.

22 Q. I think I heard you say you bought the stock in advance of  
23 your appearance with Maria Bartiromo. Bought the Vivendi  
24 stock?

25 A. Yes. I bought it many times, obviously. But on that

1 specific day, on that Monday, I believe it was July 1st -- I'd  
2 have to have something to refresh myself. Let's assume that I  
3 bought stock that day and then subsequent days.

4 Q. Let's assume that the appearance with Maria Bartiromo was  
5 on July 1, 2002?

6 A. Is that what you are saying? It's in one of these books.  
7 Can I look it up if that's what you gave me?

8 Q. I'm happy to have you look it up. Do you want to look at  
9 your deposition?

10 A. This is what you handed me.

11 Q. Either way. I think the record will show that it was on  
12 July 1, 2002.

13 A. You're a lawyer. I trust you.

14 Q. We have agreed in this case that you purchased 312,000  
15 Vivendi ADRs on July 2, 2002. Is that consistent with your  
16 recollection?

17 A. No. I'd have to look at the numbers. I didn't memorize  
18 them.

19 THE COURT: I think your lawyer stipulated to that.

20 A. If he stipulated to that, yes. I bought it.

21 Q. Did you buy those shares after you learned about what had  
22 happened at Vivendi?

23 A. I had bought shares before and after I learned about what  
24 happened at Vivendi with Messier and the challenges with  
25 regards to what he said publicly on liquidity and subsequently

1 to that.

2 Q. So you bought stock, bought Vivendi stock, before that  
3 happened and after that happened, right?

4 A. Yes, sir. That's during the relevant period.

5 Q. Right.

6 A. I'm still buying.

7 Q. I'm only talking about the relevant period.

8 A. Right. Thank you, sir.

9 Q. In response to one of Mr. Cappucci's statements, you said  
10 that you thought that public information was incorporated into  
11 the price of a stock. Did I understand that correctly?

12 A. I've got to tell you it's one of those -- I don't remember  
13 his question or my answer today even though it was only four  
14 minutes ago.

15 THE COURT: Do you agree?

16 THE WITNESS: Yes. Thank you.

17 A. Publicly known information is generally incorporated in the  
18 price of a stock at a given moment in time.

19 Q. I put in front of you a transcript of the deposition that  
20 you gave in this case.

21 A. This?

22 THE COURT: Yes.

23 MR. SAUNDERS: That's for the witness. Let me give  
24 one to your Honor.

25 THE COURT: Thank you.

1 A. As you know, I gave two depositions. This is one of the  
2 transcripts, correct? Or is this both?

3 Q. This is both. They are separated by the blue sheet.

4 A. OK. Thank you.

5 THE COURT: Blue sheet? I don't have a blue sheet.  
6 Mr. Saunders?

7 MR. SAUNDERS: Your Honor, let me give you my copy  
8 that does have a blue sheet.

9 THE COURT: You may need to use it.

10 MR. SAUNDERS: I have another copy.

11 A. Can you show me the blue sheet? This does not have one.

12 Q. Take mine.

13 A. I see. You can see it easier.

14 Q. Do you recall being deposed on the second day of your  
15 deposition, which took place on June 25, 2007?

16 A. I assume that's what this says after the blue sheet. I was  
17 deposed twice. If that's the second day, that's it. It  
18 doesn't say twice, but that's it, on line 2.

19 Q. Were you put under oath on that occasion?

20 A. Yes.

21 Q. Do you recall being asked the following question and giving  
22 the following answer?

23 THE COURT: Page what?

24 MR. SAUNDERS: Page 164, your Honor, over to 165.

25 THE COURT: Let him find it, too. 164, a few pages

1 after the blue sheet. Do you see it?

2 THE WITNESS: Right here.

3 Q. You might want to start reading at line 12 on page 164.

4 A. Slow down. Page 164 is the one in the upper right-hand  
5 corner?

6 THE COURT: Yes, correct. Go ahead.

7 Q. The question was, "You testified that the information that  
8 you used to determine whether Vivendi stock was undervalued  
9 during the relevant time period was public information,  
10 correct?"

11 Then you answered that question.

12 A. I see the answer.

13 Q. You talked about having access to inside information, which  
14 you denied.

15 THE COURT: Wait. The record won't be clear. Let's  
16 read it.

17 "A. As opposed to nonpublic, which would be that I would have  
18 access to inside information. If I had access to inside  
19 information, the first thing you do is pick up the phone, call  
20 the general counsel, and put it on the restricted list and  
21 determine whether or not it's public or nonpublic." You gave  
22 that answer, right?

23 THE WITNESS: I gave that answer in the question that  
24 your team asked or Mr. Cappucci asked or someone asked.

25 Q. The next question was, at line 24, "Was that public

1 information incorporated into the market's pricing of the  
2 security during the relevant time frame? Do you see that?  
3 Your answer was, and I quote --

4 A. Whoa.

5 Q. Do you see that, line 24?

6 A. Thank you. It dropped down one. Got it.

7 THE COURT: The answer is?

8 Q. "You're asking me not what I do. You're asking me to  
9 public stock price when a stock like General Motors is trading  
10 at 36. It may or may not be. I don't know." Was that answer  
11 true at the time you gave it?

12 A. There were many questions prior to that, and I tend to talk  
13 a lot and explain a lot. Obviously, I'm not going to say this  
14 is not true, but I don't know the context in which it's true or  
15 not true. It's a statement that I would make just like I did  
16 with Google earlier.

17 Q. Let's look at the next question and answer.

18 "Q. Is it your understanding during the relevant time period  
19 that public -- that the public information you were using to  
20 make your investment decisions was incorporated into the public  
21 market price of Vivendi securities?" Do you recall being asked  
22 that question?

23 A. Not really.

24 Q. And did you give the following answer to that question?

25 "A. You're getting into a philosophical debate between random

1 walk type analysis and value investing and securities analysis.  
2 I assume that there are those who would follow Professor  
3 Malkiel's theory of the random walk. I don't. And it's been  
4 proven that it's an inferior methodology over an extended  
5 period of time."

6 Did you give that answer to that question?

7 A. I read it here, and I would not change that answer. I  
8 would embellish on it, but I wouldn't change it.

9 Q. Thank you.

10 MR. CAPPUCCI: May I have a moment, your Honor?

11 THE COURT: Sure.

12 MR. CAPPUCCI: I'm sorry. I thought you were done.

13 Q. Mr. Cappucci asked you about your decision to purchase  
14 Vivendi stock during the relevant period. Do you recall those  
15 questions?

16 A. Not all of them.

17 THE COURT: Just now.

18 A. Just now, more or less, but not all of them and not in  
19 detail.

20 Q. Do you actually remember what determinations preceded your  
21 decision to purchase Vivendi stock during the relevant period?

22 A. The mosaic that I follow, as a race car driver or a pilot  
23 and a checklist, if I were a pilot there would be a checklist.

24 I don't have a checklist on my desk. But trained as a  
25 professional, there are things that I ask daily/weekly in terms

1 of the portfolio and the security that we select: What is the  
2 price in the public markets? how much do I want to own for this  
3 client? and so on. Those are the elements, if you're asking me  
4 what I would look at.

5 Q. Could you answer my question.

6 A. I thought I did. Could you rephrase it then.

7 Q. Would you like it reread?

8 A. Can you re-echo it then?

9 Q. Do you actually remember the determinations that preceded  
10 your decision to buy Vivendi stock during the relevant period?

11 A. I think they are the same as any stock I buy. 90 percent  
12 are the same.

13 Q. Does that complete your answer?

14 A. I don't have anything else to add. What would you like me  
15 to say?

16 Q. Would you turn to page 166 of your deposition. Do you  
17 recall being asked this question and giving this answer under  
18 oath?

19 A. What line?

20 Q. Line 13.

21 "Q. What determination preceded your decision to purchase  
22 Vivendi securities during the relevant time period?"

23 Then there is an objection by Mr. Cappucci. Then you  
24 answer.

25 "A. The dynamics that are involved in our decision-making on



1 many stocks, and specifically Vivendi, is earnings per share,  
2 EBITDA, PMV, statements that we use to gather that information.  
3 But specifically for Vivendi at that moment on a given time,  
4 I'd have to do a lot more analysis than I could today. And I  
5 couldn't reconstruct why I'm even buying General Motors this  
6 morning."

7 Did you give that answer to that question under oath?  
8 A. You keep coming back to under oath. We stipulated that  
9 every question I gave an answer to is under oath. Why are you  
10 trying to intimidate me by asking that question?

11 THE COURT: I don't think anybody has ever intimidated  
12 you, Mr. Gabelli.

13 THE WITNESS: I remember one occasion.

14 THE COURT: That was a long time ago. Let's go on.

15 THE WITNESS: You remember what you had when you were  
16 8 years old.

17 THE COURT: Mr. Saunders, he gave that answer,  
18 clearly. It's in the transcript.

19 MR. SAUNDERS: I have no further questions. I have  
20 one piece of housekeeping that is left over from yesterday,  
21 your Honor. There was an exhibit that you admitted subject to  
22 connection.

23 THE COURT: Yes. You wanted to ask him a question.

24 MR. SAUNDERS: Yes.

25 Q. In your book, Exhibit X, is that your handwriting on

1 Exhibit X?

2 A. On the right-hand side, I would say it is, yes.

3 MR. SAUNDERS: Thank you, your Honor. I offer  
4 Exhibit X.

5 THE COURT: Mr. Cappucci.

6 **RECROSS-EXAMINATION**

7 BY MR. CAPPUCCI:

8 Q. Just one question. Mr. Saunders just asked you questions  
9 about your recollection, your specific recollection about the  
10 investment process which preceded investments in Vivendi  
11 securities during the relevant period. My question is, do you  
12 have any reason to believe that you did not follow your routine  
13 practice which you had done throughout the period?

14 A. No. In fact, I'm reading the sentence on line 22 of this  
15 deposition, and it says, specifically at that time moment at a  
16 given time after a lot more analysis than I could do today.  
17 That analysis meant thinking about the elements that went into  
18 my checklist as opposed to analysis in terms of understanding  
19 the company's fundamentals.

20 Q. Mr. Gabelli, if I told you that the mutual fund purchases  
21 on July 2nd of '02 were made at prices between \$15 and \$18 per  
22 ADR and the previous day close was \$22, would that give you  
23 some basis to say that there was a disclosure in the market-  
24 place which preceded your investments?

25 MR. SAUNDERS: Your Honor, I'm going to object to that

1 question. There is no foundation for that question at all in  
2 this record.

3 THE COURT: Not in this record. We have no foundation  
4 of price.

5 Q. Does that pricing information refresh your recollection as  
6 to whether your transactions on July 2nd were subsequent to  
7 information in the marketplace?

8 A. I read some material this morning. I checked the price of  
9 Vivendi by day, what I was doing the Monday night, what I was  
10 doing the week before, the fact that on that, not Thanksgiving,  
11 Fourth of July, I then left to go somewhere else. I looked at  
12 those three days. Clearly, it did refresh. But it was not  
13 unaided. I read this last night.

14 MR. CAPPUCCI: No further questions. Thank you very  
15 much.

16 MR. SAUNDERS: Nothing, your Honor.

17 THE COURT: Thank you, Mr. Gabelli.

18 THE WITNESS: Thank you, your Honor. Am I finished?

19 THE COURT: Yes, you are.

20 (Witness excused)

21 MR. SAUNDERS: Your Honor, we rest.

22 THE COURT: Anything more, Mr. Cappucci?

23 MR. CAPPUCCI: Nothing, your Honor.

24 THE COURT: I would like to have closing arguments.  
25 I'd like to take a 5-minute recess before that. What's the

D2jrgam2

1 order here? The burden of proof is usually the last word, so  
2 you would go first, Mr. Cappucci.

3 MR. CAPPUCCI: I went first, your Honor.

4 THE COURT: You went first in the opening?

5 MR. CAPPUCCI: Yes.

6 THE COURT: I don't remember that. But it doesn't  
7 matter. The burden of proof is on Mr. Saunders to rebut the  
8 presumption, so he gets the last word. That's the way it goes.  
9 We will reconvene in five minutes. Thank you.

10 (Recess)

11 THE COURT: Mr. Cappucci.

12 MR. CAPPUCCI: Your Honor, I must say I don't have  
13 much by way of a closing statement. Your Honor has sat here  
14 very patiently for two days, and in view of the Court's level  
15 of experience with the issues of fraud on the market, its  
16 offering of many decisions in this area, citing, using the  
17 fraud-on-the-market presumption in this case, having to  
18 navigate through it, I am cautious about proceeding with a  
19 closing statement and going through the levels of evidence. I  
20 really believe that it I will be criticized for that, so I want  
21 to be brief.

22 I believe that the case presents a significant legal  
23 issue on the question of what is meant by "intrinsic value."  
24 The case law uses the word "intrinsic value." This is again  
25 how the case law after Basic identifies scenarios where the

D2jrgam2

Summation - Mr.Cappucci

1 presumption is rebutted. Counsel is pointing to a sentence  
2 which the Court adopted, which is Second Circuit case law,  
3 which says that the presumption may be rebutted if the investor  
4 does not believe that market price is intrinsic value.

5 It is our position, your Honor, and as we have  
6 painstakingly read back to Basic, read the decisions in  
7 Bombardier, in Hevesi v. Citigroup and gone very far back, we  
8 believe that the decisional authority when it uses the term  
9 "intrinsic value" is not using the same language that our  
10 client is using.

11 When the case law is referring to intrinsic value, it  
12 is asking whether the investor believes the stock price is  
13 inflated as a result of being manipulated. This goes back, for  
14 those of us who have been doing this a while, it goes back to  
15 true value. We had value lines of cases. When we asked  
16 questions about true value, true value was the market price of  
17 the stock less inflation as a result of the fraud.

18 What Vivendi and their team has done is they found a  
19 defendant who used the term "intrinsic value" as they have  
20 referred to it in their documents.

21 I apologize to the Court for the painstaking effort  
22 that we just went through with documents. I would ask that you  
23 please accept my client as a person who wants to be precise and  
24 that he is trying to be precise in an important case.

25 (Continued on next page)

D2jegam3

Mr. Cappucci - closing

1 MR. CAPPUCCI: And obviously recognizing that we're in  
2 the Southern District before your Honor.

3 So putting that aside, what has happened here is  
4 Vivendi has found documents by an investor which used the word  
5 intrinsic value. And they're trying to say that this version  
6 of intrinsic value is the intrinsic value which the case law  
7 points to. It's apples and oranges, your Honor. It's a  
8 different concept. And I ask you, I plead with you to go back  
9 to the cases.

10 But in our analysis, we found a case, a decision by  
11 Judge Nickerson, back in 1989, which, in fact, made the same  
12 price -- the same observation. And that is the decision in the  
13 *Ballan* case, 720 F.Supp. 241. And I'll just read, I'll just  
14 read from that decision.

15 If, however, the corporation makes public disclosures  
16 that are false or misleading or fails to disclose material  
17 information, the price of its securities will not reflect their  
18 true value. The corporation will have perpetrated a fraud on  
19 the market. Even investors who never knew of the misleading  
20 disclosures will have been defrauded if they relied on the  
21 integrity of the market price.

22 Market price, the integrity of market price. So the  
23 case law, when it's using the term intrinsic value, is not  
24 looking for what an investor is defining that term. So when  
25 Mario and his investor -- and his research folks are talking

D2jegam3

Mr. Cappucci - closing

1 about intrinsic value, that's the model. That's the PMV. We  
2 heard it at length. We heard about the model. It's a  
3 projected model which seeks to identify value going out. It's  
4 not meant to be a construct or a substitute for price on a  
5 given day.

6 They rely on price. Mr. Gabelli said he relied on  
7 price. I have no reason to believe he didn't rely on price.  
8 That's what they would do. That's all they have. And simply  
9 because they believed the price of the stock was going up,  
10 because of a valuation, that doesn't make them any different.  
11 That doesn't make them atypical from most, if not all,  
12 institutional investors.

13 THE COURT: Let me tell you the question I have for  
14 you, Mr. Cappucci, and it's troubling me.

15 MR. CAPPUCCI: Sure.

16 THE COURT: You seem to be describing what I would  
17 call an irrebuttable presumption. In other words, there's  
18 false statements. They're incorporating the price. The price  
19 is artificially inflated. Nobody buys into a crooked crap  
20 game. So this so-called presumption of reliance sounds  
21 irrebuttable because it's in the price. It's inflated. Why do  
22 we have a reliant element that's different from a fraud  
23 element, and how do you ever rebut that presumption? Had the  
24 Supreme Court wanted to tell us it was irrebuttable, they would  
25 have said, if you trade in an efficient market and there's a

D2jegam3

Mr. Cappucci - closing

1 fraud, and the information is incorporated into the market  
2 price, it's over. There's nothing you can do to rebut it  
3 because everybody has to trade at the market price. You can't  
4 buy the stock for any other price but the market price. So to  
5 that extent, everybody says, well, I bought at the price on  
6 that day.

7 How could this be rebutted?

8 MR. CAPPUCCI: It's a great question, your Honor.

9 THE COURT: Well, it's one that's been troubling me.

10 MR. CAPPUCCI: And, in fact, in fact, let's go back to  
11 *Basic*.

12 THE COURT: Okay.

13 MR. CAPPUCCI: Because *Basic* gave us the examples.  
14 They said, you have to show that the link was severed, that the  
15 link was severed. The link between the misrepresentation, the  
16 fraud which has been proven here already and price. There's no  
17 question the price was inflated.

18 THE COURT: Right.

19 MR. CAPPUCCI: But in *Basic*, in *Basic* what happened is  
20 they said, how do you take this chain apart? How do you -- how  
21 do you delink it, so to speak? And they talked about scenarios  
22 where -- and this was a transactional case where the price  
23 was -- the truth was on the market, because the fact that the  
24 company was in takeover. It wasn't there, so the price wasn't  
25 trading at the value it should have.



D2jegam3

Mr. Cappucci - closing

1           So, for example, they said, look, if that information  
2 was in the marketplace already, there's no link between price  
3 and misrepresentation. Similarly, if the market makers knew  
4 about it and they leaked it or the company had leaked it,  
5 there's no link between the misrepresentation and the purchase  
6 price. And they also said if the person buying the securities  
7 knew about it. So clearly what would break the link here would  
8 be if Mr. Gabelli, in fact, knew that the company was making  
9 misrepresentations and the stock price was inflated before he  
10 bought it.

11           THE COURT: Well, that certainly happened at some  
12 point. We just heard about that.

13           MR. CAPPUCCI: But hold on. But, your Honor, we have  
14 a stipulation in this case. We have a truth on the market  
15 stipulation, which means that after every corrective  
16 disclosure -- and as I told you before, six of the ten, we  
17 didn't really buy much. We bought -- and maybe it's time to  
18 put up a demonstrative exhibit, if I can just put that on, just  
19 to show the price chart, your Honor. If you look at the price  
20 of -- it's on the screen now. If you look at the price of  
21 Vivendi securities throughout this period, they're way, way up  
22 in value at the beginning of the period in October of 2000.  
23 And they really start to run down.

24           And if you look at some of the bar -- the bar lines  
25 like two-thirds along the way, which is the July/August time

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Mr. Cappucci - closing

1 frame, one can understand why a buyer is in there.

2 But the fact of the matter is by the time Gabelli came  
3 in and made those big purchases, six of the ten corrective  
4 disclosures already occurred.

5 THE COURT: Yes.

6 MR. CAPPUCCI: And you had new management. He had a  
7 right to rely on new management. That didn't mean he was  
8 buying into this. He didn't -- he lost a fortune on this  
9 investment. And, in fact, the PMV model was completely wrong.  
10 And we know why that happened because with the liquidity  
11 crisis, those multiples were completely speculative.

12 So I think -- we're looking for a break in the chain,  
13 and we just don't have it here. They relied on price. And,  
14 your Honor, I don't like to -- you know, I don't want to --

15 THE COURT: What do you mean, they relied on price?

16 MR. CAPPUCCI: The integrity of the price.

17 THE COURT: He said -- your last witness, Mr. Gabelli,  
18 said it was one factor of many.

19 MR. CAPPUCCI: Well --

20 THE COURT: Obviously he said that the market price on  
21 any particular day in his opinion reflects all the public  
22 knowledge about the stock, right? That's what he said.

23 MR. CAPPUCCI: One of the most learned --

24 THE COURT: Mr. Cappucci, right? He said the price of  
25 a stock reflects all the public knowledge on that day, and he

D2jegam3

Mr. Cappucci - closing

1 believes that it was an honest price, the integrity of the  
2 price. And he said it's one element of what he considers,  
3 obviously. But he considers the margin of safety, which we now  
4 learned is a discount between his PMV and the market price. He  
5 takes into account many other factors. He's interested in  
6 catalysts. He's interested in change of management, many  
7 factors.

8 MR. CAPPUCCI: I'm going to quote a brilliant jurist,  
9 who said the fact that these traders have divergent motivations  
10 in purchasing shares should not defeat the fraud on the market  
11 presumption absent convincing proof that price played no part  
12 whatsoever in their decision-making. Obviously, your Honor.

13 The fact is, in today's market -- and by the way, your  
14 Honor, what's at stake here, Vivendi is almost 60 -- was almost  
15 60 percent institutionally owned during the relevant period.  
16 So what happens today is not just relevant for my client. It  
17 has implications beyond this and in other cases. The fact is  
18 in a modern securities market, with sophisticated investors,  
19 they clearly are looking at a multitude of factors.

20 THE COURT: Right. But what troubles me is I still  
21 say you're turning it into an absolute and not a rebuttable  
22 presumption, because the price is false, once the falsity is  
23 proved. It's no longer an honest price because it incorporates  
24 the falsity. It's an inflated price. And since everybody has  
25 to buy at the market price, and everybody would say no matter

D2jegam3

Mr. Cappucci - closing

1 how many other considerations, of course I consider today's  
2 price, of course, I don't understand how this is rebuttable.  
3 I'm really seriously asking for help here, because if the  
4 Supreme Court had told me it would be irrebuttable under those  
5 circumstances, this would be an easier trial for me.

6 MR. CAPPUCCI: Your Honor, as I said, the Court in  
7 *Basic* pointed to a handful of examples where the chain was  
8 broken.

9 THE COURT: That's a long time ago. There should be  
10 40 years of jurisprudence since then. I think it's a rare  
11 event that you have a trial on this issue alone. And whether  
12 the presumption is rebutted, most of the writing is at the  
13 motion to dismiss stage, the summary judgment stage. And then  
14 cases settle or they go to a jury. And we never know what the  
15 jury figured out anyway.

16 But it's pretty rare to have a nonjury trial focus  
17 solely on reliance, with need to make findings of fact and  
18 conclusions of law where the presumption has been rebutted.  
19 Cite me a case, but I don't know if --

20 MR. CAPPUCCI: We'd love to settle the case but --

21 THE COURT: I didn't say settle. I think I said cite  
22 me a case.

23 MR. CAPPUCCI: I said we would have loved to settle  
24 the case.

25 THE COURT: I heard that. That would be great.

D2jegam3

Mr. Cappucci - closing

1 But I said cite me a case where somebody has had to  
2 make these decisions as to what information rebuts the  
3 presumption.

4 MR. CAPPUCCI: Your Honor, there are none.

5 THE COURT: I thought so.

6 MR. CAPPUCCI: We're a case of first impression in  
7 that regard.

8 THE COURT: That's what I thought.

9 MR. CAPPUCCI: And I think it should come down to, you  
10 know, look, in this case we have all the elements of 10(b)  
11 except for reliance --

12 THE COURT: I understand that.

13 MR. CAPPUCCI: -- are on the table.

14 THE COURT: This is a solely -- Mr. Cappucci, when I  
15 speak, I beg you to just stop. You've been doing this a long  
16 time. When the judge talks, you stop. That's the way it is.

17 So I understand that. It's a very focused trial. All  
18 the other elements of 10(b) are proved. The sole issue here is  
19 whether the presumption of reliance can be rebutted or not. If  
20 not, there's no actual reliance to fall back on, right? You  
21 say it. We didn't --

22 MR. CAPPUCCI: That's not our case.

23 THE COURT: That's right. It's solely the  
24 presumption, the efficient market trading, the presumption of  
25 reliance. If it's rebutted, you lose. If it's not rebutted,

D2jegam3

Mr. Cappucci - closing

1 you win. That's the whole case. And I'm just trying to  
2 understand --

3 MR. CAPPUCCI: I understand. But, your Honor, the  
4 only thing that the defendants have pointed to to perhaps  
5 dilute any reliance on price is the PMV model. And what we  
6 hope the evidence has shown, and what we hope the Court  
7 appreciates, is that the model is not a surrogate for market  
8 price. It's a forward -- it's a forward looking document --

9 THE COURT: It's an expectation. It's where the  
10 trader thinks the stock will go. Right?

11 MR. CAPPUCCI: Right. That's correct. That's  
12 correct.

13 THE COURT: The trader says, the stock is going to go  
14 way higher than it is now. The chart that Mr. Saunders showed  
15 the last witness said it's at 73 Euro today. It will go to 100  
16 Euro under our model. We like that discount, and he wants to  
17 call it margin of safety. Doesn't matter what you call it. I  
18 call it spread. But we like that, and that's why we're buying,  
19 because we think it's going to go to our PMV.

20 MR. CAPPUCCI: Right. But, your Honor, there is --  
21 they have not submitted -- other than that, there is no  
22 evidence, there's no evidence --

23 THE COURT: Other than that, Mrs. Lincoln, how was the  
24 play?

25 The point is that may be the case. What they're

D2jegam3

Mr. Cappucci - closing

1 trying to make is the argument that if there hadn't been this  
2 artificial inflation, the market value would be even lower.  
3 The spread would be even bigger under their model of the PMV.  
4 This was a good buy. Something to buy. And that's why they  
5 bought. I think there was even evidence -- Mr. Saunders will  
6 tell me where -- some of their people said, I really don't care  
7 what it was trading at. We weren't interested in the market  
8 price. We were interested in our private market value and the  
9 spread. And we certainly didn't care about a short-term  
10 liquidity crisis. So what is -- it's important to know what  
11 the fraud was. I guess I can call -- the fraud was to hide the  
12 information about liquidity crisis. One of the witnesses said,  
13 it wouldn't have mattered to us. It's short term. We're long  
14 term. Liquidity crisis can be solved. The company comes  
15 roaring back after it takes care of that problem, and we have a  
16 model that says what a hypothetical purchaser would buy this  
17 company at down the road. It could be two years, five years,  
18 ten years. I understand there's no purchaser today, but this  
19 is our projection. We're analysts, and we think it's a good  
20 buy.

21 MR. CAPPUCCI: Your Honor, 10(b) -- if that were the  
22 law, you would be restricting the remedy here.

23 THE COURT: What's that?

24 MR. CAPPUCCI: You'd be restricting the remedy.

25 THE COURT: I don't understand what you just said.

D2jegam3

Mr. Cappucci - closing

1 MR. CAPPUCCI: You'd be taking a long-term approach.  
2 That's not what 10(b) does. We're looking at corrective  
3 disclosure. We're looking at corrective disclosures.

4 THE COURT: Now you lost me. I'm talking about what  
5 the company relied on when it bought the security.

6 MR. CAPPUCCI: I understand that. And what I'm saying  
7 is that they relied on price. They relied on price. And the  
8 price that they relied on was inflated as a result of admitted  
9 misrepresentations.

10 THE COURT: You keep saying they're relying on price  
11 as if you say it ten or twelve times, it must be true.  
12 Mr. Gabelli says it's one of the many things we considered.  
13 It's part of the mix --

14 MR. CAPPUCCI: But that's --

15 THE COURT: But that troubles me because it's got to  
16 be always part of the mix. Price is always a consideration in  
17 a buy. You can't get around that in an efficient market. This  
18 isn't the liberty media, you know, merger agreement thing.  
19 This is a stock traded on the open market.

20 MR. CAPPUCCI: I understand.

21 THE COURT: It always has a price. Every day it has a  
22 price. And every purchase in an efficient market has to buy at  
23 the price, so I'm troubled by the presumption and how it's  
24 rebutted.

25 MR. CAPPUCCI: Right. But, your Honor, what I'm



D2jegam3

Mr. Cappucci - closing

1 saying is that we would submit that as long as that -- I don't  
2 want to say it's a kernel, but as long as price is a part --

3 THE COURT: When is it not? When is it ever not in  
4 trading an efficient market?

5 MR. CAPPUCCI: In the examples --

6 THE COURT: That's your answer, then. You've given it  
7 twice. I have to read one case, according to you, the examples  
8 on that case, then it's over.

9 MR. CAPPUCCI: We're talking about two different  
10 points. What I'm saying is that this thing about intrinsic  
11 value is a construct. It's not -- it's apples and oranges.  
12 Your Honor is making a different point as to really what we  
13 relied on. Did we rely on price? What we were looking at this  
14 for long term, but it can't be the law, your Honor, that every  
15 investor who has long-term vision cannot get the benefit of --

16 THE COURT: I didn't say that. I never said that. I  
17 said what was kept at the fraud here. There are different  
18 kinds of frauds. There are different kinds of frauds that are  
19 hidden and cause artificial inflation. This one had to do with  
20 hiding information about a liquidity crisis. If the  
21 information had been known, would the stock still have been  
22 purchased?

23 MR. CAPPUCCI: Your Honor --

24 THE COURT: According to your own witnesses, they  
25 didn't care about a liquidity crisis. That's all I'm pointing

D2jegam3

Mr. Cappucci - closing

1 out.

2 MR. CAPPUCCI: Your Honor, I think maybe you're moving  
3 into causation. I think that because today, because today the  
4 rest of the case --

5 THE COURT: No. I think it's a test; something like  
6 but for this information, would the purchaser have purchased  
7 the shares if they had known of the fraud? That's all I'm  
8 trying to. Say, something -- I'm sure the defense will quote  
9 that better than I did, but that --

10 MR. CAPPUCCI: But what I'm saying is, if you have to  
11 accept the fact -- if this Court has to accept the facts that  
12 during this relevant period there were eight, nine or ten price  
13 corrections which took out the true value of the stock, and  
14 those who bought before that full correction purchased at  
15 inflated levels and were defrauded --

16 THE COURT: Yes.

17 MR. CAPPUCCI: -- you know, it's a very limited,  
18 limited inquiry at this juncture, your Honor.

19 THE COURT: Limited inquiry?

20 MR. CAPPUCCI: It's a limited, limited inquiry. And I  
21 think that you're testing, and it's very wise --

22 THE COURT: Look, even in the class action, you  
23 understand there are now going to be hearings on reliance.  
24 Reliance wasn't tried because it's individual. And we allowed  
25 class actions to be tried, even though reliance is an

D2jegam3

Mr. Cappucci - closing

1 individual issue. And we don't worry about predominance. We  
2 say we'll figure out reliance later, but it isn't over. Even  
3 though all the rest of it's proved the damages are calculated,  
4 everything else, reliance is still out there. Now we're  
5 dealing with GAMCO.

6 MR. CAPPUCCI: Well, there's a good way to stop that  
7 train: By finding for us in this case. But the -- look, your  
8 Honor --

9 THE COURT: I don't think that's the best argument I  
10 ever heard, but okay.

11 MR. CAPPUCCI: I think -- it may have worked across  
12 the street. But I think, your Honor, again, I feel you got it.  
13 And I think -- I feel like we're in good hands. I feel that  
14 you have a full taste for the breadth of the evidence.

15 THE COURT: In this case flattery will not help. I  
16 mean, I have a dilemma.

17 MR. CAPPUCCI: I understand that, your Honor.

18 THE COURT: I have a dilemma, and I'm trying hard to  
19 understand so that I come out with a good result. I won't use  
20 the word right because it's never right until the appellate  
21 court says it's right. But I want to come out with a good  
22 result. So I'm seriously asking questions, and I'm sure I'll  
23 ask it of the other side.

24 MR. CAPPUCCI: Just let me ask one thing. Again, the  
25 witness, who is an incredibly successful investor and a complex

D2jegam3

Mr. Cappucci - closing

1 thinker, and that's just the way he is -- he's a brilliant man.  
2 Look, he's trying -- when you're asking him what he's relying  
3 on, and he says, price, earnings per share, I mean, that's what  
4 institutions do. I mean --

5 THE COURT: I understand.

6 MR. CAPPUCCI: But it has to go -- it all goes back to  
7 integrity of price. And if they have no reason to believe  
8 that that investment, that security is being manipulated, they  
9 are subject, they're stand -- they're out there. The emperor  
10 has no clothes. They are subject --

11 THE COURT: But then you have your rebuttable  
12 presumption. Once the fraud is proved, once the fraudulent  
13 information is incorporated in the price, it's absolute.

14 But I think we've been around it. I don't want to do  
15 what we did throughout parts of this trial and do it five or  
16 six times. We've discussed it.

17 MR. CAPPUCCI: Your Honor, I appreciate the  
18 opportunity to try a case before you, and I thank you for your  
19 patience.

20 THE COURT: Thank you.

21 MR. CAPPUCCI: And we are concluded.

22 THE COURT: Mr. Cameron?

23 MR. CAMERON: Your Honor. Your Honor, I do intend to  
24 go through some of the record. I have a small binder that may  
25 assist the Court. If I could pass that up.

D2jegam3

Mr. Cameron - closing

1 THE COURT: Small binder? There's 24 exhibits here.

2 MR. CAMERON: And I will endeavor not to go through  
3 all of them, but I -- in case your Honor has questions, and I  
4 do relate to some of the propositions that have come out during  
5 the course of the evidence as to how the plaintiffs here viewed  
6 the stock market price of Vivendi securities at the time they  
7 made their investment decisions and how they made those  
8 decisions generally. So I'll come to those, your Honor.

9 But I think the appropriate place to start here is  
10 that the plaintiffs have sought to establish reliance in this  
11 case in one way and in one way only: By invoking via  
12 collateral estoppel the same presumption of fraud on the market  
13 that was asserted in the class action.

14 THE COURT: That was what?

15 MR. CAMERON: That was asserted in the class action.  
16 Sorry, your Honor.

17 And that's important because it means that the GAMCO  
18 plaintiffs here, both the individual investors and also the  
19 mutual funds, are asserting that but for the false and  
20 misleading statements made by Vivendi during the relevant  
21 period, statements that under the fraud on the market  
22 hypothesis were imputed into the stock price, they would not  
23 have transacted in Vivendi securities, in the Vivendi ADRs that  
24 are the basis of the damages claims. And that's the basis of  
25 plaintiff's assertion.

D2jegam3

Mr. Cameron - closing

1 But we know, based on the record of evidence now  
2 before the Court, your Honor, that that's not true. It's not  
3 correct to say that but for Vivendi's misstatements, the GAMCO  
4 plaintiffs would not have transacted in Vivendi ADRs during the  
5 relevant period, because the evidence in this case, your Honor,  
6 demonstrates that under the investment methodology that they  
7 did use, which turned on a calculation of Vivendi's private  
8 market value and a comparison of their value to stock price,  
9 that plaintiffs would have continued to purchase Vivendi  
10 securities during the relevant period even in the absence of  
11 the fraud.

12 Now, the argument that Mr. Cappucci made, and the  
13 assertion that Mr. Gabelli made on the stand today, your Honor,  
14 was that they would not have purchased had they known about the  
15 fraud. And we'll come to whether or not that's accurate. But  
16 that is different to saying that if those misstatements had not  
17 been made, that they would not have bought those securities.  
18 And that is the but-for test that is applicable here.

19 And the reason why they would have bought these  
20 securities, even in the absence of those misstatements, is  
21 precisely the dynamic that you were just asking Mr. Cappucci  
22 about. And that is, the price of Vivendi securities actually  
23 would have dropped even further as the inflation came out and  
24 would have been lower. A lower price would have meant an  
25 increased spread, whether you call it the discount or the

D2jegam3

Mr. Cameron - closing

1 margin of safety, and would have increased the attractiveness  
2 of this investment to GAMCO.

3 And as Mr. Rittenberry confirmed during his testimony,  
4 the size of that discount was one of the main factors in his  
5 recommendation to buy securities where their price was below  
6 the private market value.

7 THE COURT: So the only thing that troubles me in that  
8 argument is that to some extent you always rely on the market  
9 price, at least as part of the formula. If the discount is too  
10 small -- you know, if it's a penny -- that's not going to be a  
11 value investment for Gabelli, right? So -- or private market  
12 price is higher, despite what he said, that's typically not the  
13 kind of stock you would buy. So you have to -- so market price  
14 is one of the parts of the mathematical equation. Therefore,  
15 one relies on it in part at least, right?

16 MR. CAMERON: Well, but, your Honor, yes, it is  
17 obviously part of what they looked at.

18 THE COURT: Right.

19 MR. CAMERON: Right? But with respect, that's not the  
20 test. The test that was laid down by the Supreme Court in  
21 *Basic* and also by the Second Circuit is, as your Honor pointed  
22 out in your summary judgment opinion, whether in looking at  
23 price the purchaser treated stock price or viewed stock price  
24 as an accurate measure of the intrinsic value of the security.

25 Now, Mr. Cappucci suggested that that's a construct,

D2jegam3

Mr. Cameron - closing

1 that we have latched on to some words in a series of opinions,  
2 but it's not. That concept was front and center in the *Basic*  
3 decision and has been referred to, I think, in five separate  
4 Second Circuit Court of Appeals cases since, including the  
5 *Teamsters* case that your Honor cited in your summary judgment  
6 opinion.

7 THE COURT: More than cited. I think it was mine in  
8 the district court.

9 MR. CAMERON: Exactly.

10 MR. CAPPUCCI: It was, your Honor.

11 THE COURT: I thought so.

12 MR. CAMERON: It was your opinion in the district  
13 court, but what I mean is you cited it in the summary judgment  
14 in this case.

15 THE COURT: I know.

16 MR. CAMERON: In fact, if you go and look at *Basic*,  
17 it's obvious that this value concept was part of the way they  
18 formulated the presumption of fraud on the market. And, in  
19 fact, in doing so, at page 244 of their opinion, they relied  
20 upon the *LTV Securities Litigation* case, and I quote, the  
21 market is acting as the unpaid agent of the investor, informing  
22 him that given all the information available to it, the value  
23 of the stock is worth the market price. That was the basis for  
24 this presumption.

25 And it's the key here, your Honor, is that it's not



D2jegam3

Mr. Cameron - closing

1 just part of what you look at. After all, this is but for  
2 causation. And what establishes the causation element of this?  
3 What establishes the but-for part is your reliance upon the  
4 stock price as the intrinsic value of the security, and that's  
5 why you buy. It's that assumption that gives investors, if you  
6 like, the pass on showing that they looked at the actual  
7 misstatements.

8 THE COURT: Well, of course all investors believed  
9 that the market price will change to their benefit. Right?  
10 They think it's going to go up, they're long. If they think  
11 it's going to go down, they're short. But they always think  
12 that they know where it's headed. So is that so different from  
13 Mr. Gabelli's PMV? There's an expectation of either rise or  
14 fall. You never really think the market price is the end of  
15 the story, because you're a speculator. You're a gambler.  
16 That's what the stock market is. You think it's going to go  
17 up, you think it's going to go down, you're going to make money  
18 one way or the other, depending if you buy long or short. But  
19 you never think that's the absolute value, because you think  
20 you know better. You think you know what direction it's going  
21 to go in.

22 MR. CAMERON: Two points. The first is what you just  
23 said I think challenges the concept or idea of the efficient  
24 market hypothesis that underlies *Basic*.

25 THE COURT: Efficient market concept I thought was

D2jegam3

Mr. Cameron - closing

1 that the market absorbs all of the public information and,  
2 based on all that information, sets today's price. I  
3 understand that.

4 But I still say that that doesn't mean that that's  
5 what the investor thinks is sort of a final value, because the  
6 investor is betting it will go up or it will go down, based on  
7 the investor's own training, knowledge, experience, whatever it  
8 is he or she thinks they know.

9 MR. CAMERON: But I think the question, your Honor, is  
10 at the time of the transaction -- and this is the way that the  
11 Supreme Court formulated the test -- is the market value of the  
12 security an accurate measure of its intrinsic value? It may go  
13 up, it may go down, but the question is: How did the investor  
14 purchasing the securities regard the market price at that time?

15 THE COURT: Surely you've heard the phrase, oh, that's  
16 a good stock, it's undervalued. You know, I'm going to buy  
17 that one because I think it's trading at less than its value.  
18 That's a pretty common statement. It happens every day. You  
19 may even have bought on that idea: Certain stock is  
20 undervalued, I think I'll buy that one.

21 MR. CAMERON: But again, your Honor, the key here is  
22 how the investor looks at the stock.

23 THE COURT: Right.

24 MR. CAMERON: Right?

25 THE COURT: Right.

D2jegam3

Mr. Cameron - closing

1 MR. CAMERON: And whether it measures the intrinsic  
2 value at that time.

3 The key point, your Honor, is that that is the --  
4 that, if you like, principle is what was dictated by the  
5 efficient market hypothesis which underpins the *Basic*  
6 decision.

7 THE COURT: So every time the investor -- so, wait a  
8 minute. So every time the investor thinks a stock is  
9 undervalued, that its intrinsic value is really higher, I'm  
10 going to buy it? It's a bargain every time the investor thinks  
11 that they're no longer relying on the market price?

12 MR. CAMERON: Well, I believe the point, your Honor,  
13 is the difference between the investor thinking what might  
14 happen in the future and is that stock --

15 THE COURT: It's a little more than that. He thinks  
16 the stock is undervalued at today's price.

17 MR. CAMERON: Well, your Honor, what your Honor is  
18 doing is, I think, questioning again the efficient market  
19 hypothesis that underlies *Basic*. If the hypothesis doesn't  
20 work, if the market is not pricing the value of that security,  
21 then the question is, frankly, whether investors should have  
22 benefit of it in the first place. The test, the issue before  
23 the Court, your Honor, is not whether the presumption should be  
24 applied.

25 THE COURT: No, of course not.

D2jegam3

Mr. Cameron - closing

1 MR. CAMERON: It's whether it can be rebutted --

2 THE COURT: True.

3 MR. CAMERON: -- under the existing law before the  
4 Court.

5 THE COURT: True. Actually, I think all three of us  
6 agree on that: Plaintiff, defendant, Court.

7 MR. CAMERON: And I think the question your Honor is  
8 asking goes to if you like the way that the efficient -- the  
9 fraud on the market presumption was established in the first  
10 place. What the Supreme Court clearly held was that the  
11 market -- and the reason for the fraud on the market  
12 presumption is that the market is acting as the agent of the  
13 investor and pricing the value of the security.

14 THE COURT: Okay.

15 MR. CAMERON: And that's why, for purposes of  
16 rebutting the test, your Honor, the question that is being  
17 posed is --

18 THE COURT: Okay. So let's keep going. So let's say  
19 I won't question that any longer and the market price reflects  
20 the intrinsic value of the stock. Now we get GAMCO, who has  
21 all these publicity materials that define intrinsic value as  
22 the PMV.

23 MR. CAMERON: Well, I think --

24 THE COURT: Does that break the chain, so to speak?

25 MR. CAMERON: Absolutely, your Honor, because, you

D2jegam3

Mr. Cameron - closing

1 know, while it seemed unclear as to what they view the PMV as,  
2 it is absolutely clear on the record, there isn't a shred of  
3 evidence the other way that they did not view the stock price  
4 as an accurate measure of the intrinsic value of the security.  
5 And that is really unchallenged. And the reason you have that  
6 binder before you, your Honor, is that throughout GAMCO's  
7 documents and throughout the testimony of their experts,  
8 including the president and COO of their company and even  
9 Mr. Gabelli himself, nobody once said that they purchased the  
10 security relying upon the accuracy of the stock price as an  
11 accurate measure of the stock's intrinsic market value. And  
12 that absolutely severs the link. It absolutely severs the  
13 link, your Honor.

14 The point here is that they thought the stock was,  
15 indeed, dramatically undervalued. You know, in the words of  
16 Mr. Rittenberry -- and perhaps, you know, this gets back to the  
17 question your Honor was asking -- it's not that there's some,  
18 you know, sentiment that maybe things are going to go up or  
19 down slightly in their view. It was a dramatic disparity  
20 between the value that they ascribed to the security and the  
21 market price.

22 THE COURT: Right. I do understand that. But many  
23 investors, as I said before, even little people like you or me,  
24 say, oh, this stock is undervalued. That's why I'll buy it,  
25 because I don't think that that's the real value. I think it's

D2jegam3

Mr. Cameron - closing

1 much higher and I'm going to make money. That's a common  
2 occurrence. And so I'm saying, when that occurs, does that  
3 sever the link that nonetheless, on the moment you bought, you  
4 relied on the market price to the extent that you said, I'm  
5 going to make money, because this price reflects all the  
6 information now known, but I think that information shows that  
7 the stock is undervalued?

8 MR. CAMERON: Well, I think your Honor -- frankly, in  
9 the strict words of the test that was laid down by the Supreme  
10 Court, if an investor purchases not relying upon the market  
11 price as a measure of the intrinsic value of the security, that  
12 does sever the link. The reason here is that it's based upon,  
13 you know, the imputation of publicly available information.  
14 And the point here, if they relied on something else --

15 THE COURT: I see.

16 MR. CAMERON: -- not publicly available information,  
17 like the GAMCO investors did, here, quite surprisingly  
18 actually, your Honor, because it's the first time it's been  
19 asserted in this case, Mr. Gabelli said they relied not just on  
20 PMV, right, but also a mosaic, I think was his word, of other  
21 things, including even, for example, whether he was meeting  
22 Ms. Bartiromo and she was interested in telecommunications  
23 securities.

24 I mean, quite frankly, your Honor, as a side note, and  
25 I only mention it as a side note, that mosaic of things that

D2jegam3

Mr. Cameron - closing

1 they said they relied upon as part of their investment  
2 decision, including mergers, activity in the sector, their  
3 knowledge, is consistent with the assertion of the fraud of the  
4 market presumption that they relied upon here and suggests that  
5 rather than relying on the misstatements --

6 THE COURT: But that raises the question of the word  
7 solely. You have to rely solely on the market price?  
8 Mr. Cappucci quoted a decision of mine apparently where I said  
9 something like, it doesn't have to be the sole information on  
10 which it relies, as long as you rely on it to any extent.

11 MR. CAMERON: Actually --

12 THE COURT: He didn't tell me which of my many cases  
13 it was.

14 MR. CAMERON: And I haven't seen the decision, your  
15 Honor, so I can't comment on your Honor's decision.

16 THE COURT: He did quote it. What were you quoting  
17 from, Mr. Cappucci?

18 MR. CAPPUCCI: Hold on a second. IPO. IPO, your  
19 Honor.

20 THE COURT: Okay. One of the IPO decisions.

21 MR. CAPPUCCI: Again, it's 227 F.R.D. 65 at point 22,  
22 it looks like.

23 MR. CAMERON: I note it, your Honor, because it's  
24 separate to say, well, they have alleged in this case. I don't  
25 think it's determinative, and we're not relying upon that to

D2jegam3

Mr. Cameron - closing

1 win this issue before your Honor. The issue is whether or not  
2 they relied on the stock price as an accurate measure of  
3 intrinsic value.

4 THE COURT: I know, but are you arguing sole reliance,  
5 that assumes they're relying on other things in addition to  
6 market price, that defeats the presumption? Is that your  
7 argument?

8 MR. CAMERON: Well, I think actually in that sense,  
9 your Honor, you have to assess how they are relying upon the  
10 stock price, because that's the proxy for the misstatements  
11 that are at issue here. It obviously has nothing to do with a  
12 decision. And that's part of the concern here, your Honor,  
13 because the stock price here served no purpose at all, other  
14 than just a comparator in the PMV analysis, right? And that  
15 raises the concern that your Honor --

16 THE COURT: Well, I don't know if it's only as a  
17 comparator. He may have watched the up and down. You know, is  
18 it on a downward trend or an upward trend? I'm sure  
19 Mr. Gabelli managed to put that in his testimony somewhere,  
20 that he watched the price of the stock change.

21 MR. CAMERON: I'm actually not sure there's anything  
22 in the record about that, your Honor.

23 THE COURT: Well, maybe he didn't.

24 MR. CAMERON: And that's part of the issue.

25 But it is clear what is in the record is that the only



D2jegam3

Mr. Cameron - closing

1 relevance of stock price here -- and I think Mr. Cappucci even  
2 mentioned this in his opening -- is that of course they relied  
3 upon it, because it was for comparison purposes the book end  
4 with PMV analysis. And in that sense, your Honor, regardless  
5 of where you choose to draw the line, we would say this is on  
6 the wrong side of it, because it is so obviously not, you know,  
7 the motivating driving force for why they decided to purchase  
8 these securities. And --

9 THE COURT: So you think there's case law that talks  
10 about a motivating factor?

11 MR. CAMERON: I'm sorry, your Honor.

12 THE COURT: You think there's case law that talks  
13 about a motivating factor?

14 MR. CAMERON: In that I was responding to the point  
15 Mr. Cappucci made. And I haven't seen that decision. We think  
16 the test is as stated by the Second Circuit, which is simply  
17 whether or not the investor -- and, frankly, a sophisticated  
18 investor like Mr. Gabelli and the GAMCO plaintiffs even more  
19 appropriately should be held to that standard -- when they  
20 assert the fraud on the market presumption, when they attempt  
21 to prove reliance based upon the fraud on the market  
22 presumption, it's even more fair to ask them the question, did  
23 they rely upon the stock market price as an accurate reflection  
24 of the security's intrinsic value?

25 THE COURT: Finish the sentence about whether or not,

D2jegam3

Mr. Cameron - closing

1 the quote, the whether or not quote. Could you do the whole  
2 quote?

3 MR. CAMERON: I'm sorry, your Honor. Whether or not  
4 they relied upon the market price as an accurate measure of  
5 intrinsic value.

6 THE COURT: That's the whether-or-not rule?

7 MR. CAMERON: I believe that is the test.

8 THE COURT: That's not the but-for quote.

9 MR. CAMERON: Oh, I'm sorry. The but for, your Honor,  
10 is but for the misrepresentations, would they have transacted  
11 in these securities? And we say, your Honor, under the  
12 investment model that they utilized, the answer is plainly yes.

13 Now, I don't know if your Honor would find it helpful  
14 for me to summarize some of the evidence dealing with private  
15 market value. I think your Honor is obviously very familiar  
16 with it, but let me just summarize, I think, the key points  
17 that did come out. As I think the publicity materials note,  
18 and as Mr. Gabelli noted, the philosophy here is identifying  
19 and buying the securities of companies where market price is  
20 below PMV. And there was some debate, certainly in front of  
21 Mr. Gabelli, about whether the intrinsic or true value of the  
22 securities is measured by the PMV but not the stock price. In  
23 fact, the debate was whether or not it was PMV or not.

24 And frankly, your Honor, there are some very clear  
25 statements in the record by Mr. Jamieson which are in your

D2jegam3

Mr. Cameron - closing

1 binders at Tab 4, 5 and 6, and Mr. Woodson noting that the  
2 intrinsic value from the perspective of GAMCO and the mutual  
3 fund plaintiffs is represented by their calculation of private  
4 market value. And he said it absolutely clearly. He is the  
5 president and chief operating officer of the GBL group of  
6 companies.

7 In fact, it's the case that from Gabelli's perspective  
8 the true value of these companies is what is represented by the  
9 private market value?

10 Correct.

11 And the Court said, is that your understanding?

12 He said yes. And a short while later, the ultimate  
13 value is a private market value.

14 Mr. Gabelli disputed this point, but then said he  
15 couldn't answer it. And as your Honor knows, there are  
16 references to PMV being equated with intrinsic value throughout  
17 the company's documents. I've given you some examples in the  
18 binder at Tab 3, 8 and 2, including in the documents that the  
19 company, the GAMCO companies, would publicize both internally  
20 and externally to their own investors. Mr. Rittenberry  
21 testified that the calculation of PMV was independent of the  
22 stock price.

23 And the key issue, your Honor, whether the stock price  
24 represents a securities intrinsic market value, Mr. Jamieson,  
25 again, the president and COO of the company, conceded that it

D2jegam3

Mr. Cameron - closing

1 was not; that it was simply how they viewed it as an  
2 acquisition price. That was simply what you had to pay to get  
3 it as compared to the value that was represented by the PMV.

4 And even today's examination, your Honor, I think is  
5 extremely instructive on this point. The Court asked  
6 Mr. Gabelli, is it accurate to say intrinsic value and equity  
7 pricing are different?

8 And the witness answered yes.

9 And again, the Court, I think it's page 26 of today's  
10 transcript, asked: His question was, do you assume that the  
11 public market price of a security is an accurate measure of its  
12 intrinsic value?

13 Answer, I say they're apples and oranges. They're  
14 totally different.

15 And this is the key, your Honor, if there was ever a  
16 case where this presumption should be capable of being  
17 rebutted, it's this one. They viewed them as utterly  
18 different.

19 And to go back to where I started, your Honor, nobody  
20 at GAMCO in their documents or in the testimony that we have  
21 heard has asserted that the stock price does in fact represent  
22 an accurate measure of the security's intrinsic value.

23 THE COURT: I'm sorry. Say that last thing again.  
24 You mean in this case or forever?

25 MR. CAMERON: In this case, the record before the

D2jegam3

Mr. Cameron - closing

1 Court, your Honor.

2 THE COURT: Okay.

3 MR. CAMERON: I think -- and just to conclude the  
4 sequence, for Vivendi, the private market value was always  
5 above the stock price throughout the relevant period, a point  
6 that Mr. Rittenberry confirmed. And the GAMCO plaintiff's  
7 purchases of Vivendi's securities throughout the period were  
8 based upon that PMV analysis. And there's testimony in the  
9 record from Mr. Rittenberry and Mr. Jamieson confirming that  
10 that was the basis for their investments.

11 And so, your Honor, that's why we say -- and I can go  
12 to any of those, if you'd like me to, but I know you've sat  
13 through this and I don't want to belabor the point. But that's  
14 why we say the link here is severed; that it is not appropriate  
15 for them to rely upon the market price as a proxy for the  
16 misstatements that were made by Vivendi, and at the same time,  
17 when they were not relying upon that market price as an  
18 accurate measure of the intrinsic value of the security in  
19 making their investments. That is not a but-for causation.

20 Two final points, your Honor. One, of course, is that  
21 the plaintiff's purchases continued even as the fraud was being  
22 revealed throughout 2002, according to their own damages expert  
23 Dr. Nye. This is a point that was noted by Mr. Saunders in his  
24 opening. And the fact is -- in fact, can we put up Tab 22.

25 This is the chart that Mr. Saunders used in his

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Mr. Cameron - closing

1 opening showing that the GAMCO plaintiffs increased their  
2 holdings by nearly 200 percent after it began to be revealed  
3 and the mutual fund plaintiffs increased their holdings by over  
4 100 percent after that fraud began to be revealed. And those  
5 purchases aren't disputed, your Honor.

6 But what they also indicate is, again, how this  
7 investor was making its investment decisions pursuant to their  
8 model, which had no bearing on the fraud that was being  
9 disclosed during the course of 2002.

10 And then finally, your Honor, the last point --

11 THE COURT: Does it matter what the subject of the  
12 fraud was? The question I asked the plaintiffs, Mr. Cappucci,  
13 I said the fraud that was being hidden here had to do with a  
14 liquidity crisis. And a couple of the witnesses, I think,  
15 said, well, that wouldn't have mattered because it's a  
16 short-term event, and our investment decision is based on, you  
17 know, a two-year or long period.

18 MR. CAMERON: Well, actually, that's my next point,  
19 your Honor, precisely that issue, which is Mr. Rittenberry, as  
20 you noted, described as a short-term event and was asked, how  
21 would that supposed liquidity crisis impact your PMV  
22 calculation?

23 I don't believe it did.

24 You don't think it did?

25 No.

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Mr. Cameron - closing

1 I take it that if it did not affect your PMV  
2 calculation, then a liquidity crisis would similarly not affect  
3 your buy, sell or hold recommendation?

4 No, not necessarily.

5 So, again, your Honor, when we come back to the  
6 question of but-for causation, but for these misstatements,  
7 would they have transacted, that, again, goes to the answer,  
8 yes. And that is, again, why the plaintiffs here cannot  
9 establish reliance, your Honor. And that's why in Vivendi's  
10 submission the link is severed. The plaintiffs cannot show  
11 reliance, and that's why the damage claim should be filed.

12 THE COURT: Thank you.

13 MR. CAPPUCCI: Your Honor, just one point. At the  
14 prices paid.

15 THE COURT: I know, you've added that, and you've  
16 cited an Eastern District case, then maybe a Southern District  
17 case, and then some out-of-circuit cases. Vivendi spent time  
18 in their brief saying that the Eastern District case relied on  
19 a circuit case that didn't say what it said. And the Southern  
20 District case which I looked at was really, I'm sorry to say, a  
21 bit of a misquote because the use of ellipses took out the key  
22 portion of it. So most of the law is really out of circuit on  
23 that, but I don't know that that's a key point. I know you  
24 made the argument.

25 Okay. I think we're done. Thank you.

D2jegam3

Mr. Cameron - closing

1 MR. CAPPUCCI: Thank you so much, your Honor.

2 MR. SAUNDERS: Thank you, your Honor.

3 MR. CAPPUCCI: Your Honor does not want any post-trial  
4 briefing?

5 THE COURT: I don't think it's necessary, given the  
6 pretrial. Anybody disagree?

7 MR. SAUNDERS: No, your Honor.

8 MR. CAPPUCCI: I think we owe you, though, the  
9 Woodson --

10 THE COURT: I would take that.

11 (Adjourned)

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## INDEX OF EXAMINATION

Examination of:	Page
MARIO J GABELLI	
Direct By Mr. Saunders . . . . .	158
Cross By Mr. Cappucci . . . . .	209
Redirect By Mr. Saunders . . . . .	221
Recross By Mr. Cappucci . . . . .	230